Supreme Court, U.S.
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No. 91-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TEXACO INC.,

Petitioner,

v.

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the jury's punitive damages award of $25,000,000 constitutionally defective because the award was subject only to limited post-trial review for "excessiveness" under a "shock the conscience" test, instead of the rigorous post-trial review of objective factors approved in *Haslip*?

2. Did Plaintiff's failure to cross-appeal the adverse jury verdict on her punitive damages claim in the first trial preclude her from relitigating her claim for punitive damages in the second trial?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, the following is a list of affiliated corporate entities of the Petitioner:

Four Star Oil and Gas Company
Texaco Cogeneration Company
Texaco Pipeline Inc.
Texaco Exploration and Production Inc.
Texaco Refining and Marketing Inc.
Texaco Refining and Marketing (East) Inc.
Texaco TPC Inc.
Texaco Trading and Transportation Inc.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco Limited
Texaco North Sea U.K. Company
Texaco Brasil S.A. Productos de Petroleo
Texaco Panama Inc.
Texas Petroleum Company
Getty Oil Company
Texaco Chemical Company
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
TRMI Holdings Inc.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Texaco Inc. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit in *Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991) (*Mason II*), is included in Appendix A, 1a. The District Court's opinion denying Texaco's motion for judgment notwithstanding the verdict or a new trial, reported at 741 F. Supp. 1472

(D. Kan. 1990), is included in Appendix B, 33a. The District Court's unreported ruling denying the admission of evidence regarding the profitability of Texaco's conduct is included in Appendix C, 125a.

The unreported Order of the Tenth Circuit denying Texaco's petition for writ of mandamus on the issue of the retrial of punitive damages in the second trial is included in Appendix D, 128a. The District Court's opinion permitting plaintiff to retry punitive damages in the second trial, reported on LEXIS at No. 78-1337-T, 1989 U.S. Dist. LEXIS 7825 (D. Kan. June 19, 1989), is included in Appendix E, 129a.

The opinion of the Tenth Circuit after the first trial, reported at 862 F.2d 242 (10th Cir. 1988) (*Mason I*), is included in Appendix F, 134a. The District Court's unreported opinion after the first trial denying plaintiff's motion for a new trial on punitive damages is included in Appendix G, 149a.

JURISDICTION

The Tenth Circuit entered its judgment on November 18, 1991, and denied Texaco's timely Petition for Rehearing And Suggestion For Rehearing *En Banc* on January 14, 1992. App. 168a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE OF PROCEDURE

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty or property without due process of law. . . ."

The Seventh Amendment to the United States Constitution provides in pertinent part: "In suits at common law . . . the right of jury trial shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the Common law."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

Federal Rule of Civil Procedure 59 provides in relevant part as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

STATEMENT OF THE CASE

The facts are not at issue in this Petition. Coast Guard instructor Otis Mason was exposed to benzene, developed leukemia, and died. His widow pursued this products liability action against Texaco and other defendants in the District Court for the District of Kansas. The basis of jurisdiction was diversity of citizenship.

Among the defendants was the benzene producer, Texaco, which stood at the opposite end of a long chain of distribution from the ultimate user, Mr. Mason. Texaco sold the benzene in bulk with written product warnings. The trial record reflects that the benzene was repackaged and resold by several chemical purveyors without Texaco's warnings. Eventually the U.S. Coast Guard purchased the benzene as a part of kits used for testing marine engine oil.

The Coast Guard directed Mr. Mason on numerous occasions to conduct classes on the use of the testing kits, which led to his exposure to benzene. Mr. Mason was neither told that the benzene in the kits was dangerous, nor ever given the Coast Guard's own manuals which set forth the proper procedures for the safe handling of benzene.

There have been two jury trials of this case. In the first trial, the jury found for Plaintiff on the issue of

compensatory damages and apportioned the fault among several of the Defendants (as well as a small percentage to Mr. Mason). The jury awarded total compensatory damages of $9,000,000. The district court, pursuant to Fed. R. Civ. P. 49, posed a special interrogatory to the jury that asked: "Do you find by a preponderance of the evidence that an award of punitive damages against defendant Texaco Inc. is appropriate, as defined in the Court's instructions?" App. 173a. The jury said no.

Plaintiff unsuccessfully moved for a new trial on the punitive damages claim, App. 149a, but did not thereafter appeal. Texaco did appeal and won a reversal. The mandate from the Tenth Circuit stated: "The judgment *against Texaco* is REVERSED, and the case is REMANDED for a new trial." App. 148a; 862 F.2d at 250 (emphasis added).

This victory was short-lived, as the second jury awarded approximately the same amount of compensatory damages ($9,025,000) and found Texaco entirely at fault. Moreover, the district court permitted Plaintiff to revive the punitive damages claim in the second trial, just as if Plaintiff had won her motion for a new trial after the first jury rejected that claim. App. 132a. Texaco unsuccessfully tried to stop the retrial of punitive damages by seeking a writ of mandamus from the Tenth Circuit. App. 128a.

The claims, the jury instructions on punitive damages, the judge, the lawyers, and the courtroom were the same in both trials. The second jury, unlike the first, held Texaco liable for punitive damages in the amount of $25,000,000.

In the second trial, the district court, over Texaco's objections, admitted evidence of Texaco's net worth and annual earnings in connection with the punitive damages claim. App. 125a. The district court, however, refused to allow Texaco to introduce evidence showing profits derived from the sale of benzene alone. *Id.*

The district court denied Texaco's motion for judgment notwithstanding the verdict or for a new trial, App. 33a, and Texaco again appealed. On December 9, 1991, the Tenth Circuit affirmed the revival and imposition of punitive damages in the second trial but ordered a remittitur of the amount to $12,500,000. App. 7a-14a; 948 F.2d at 1550-54. The Tenth Circuit reviewed the punitive damages verdict solely under a traditional "shock the conscience" standard. App. 29a-31a; 948 F.2d at 1561.

The Tenth Circuit denied Texaco's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on January 14, 1992.

REASONS FOR GRANTING THE WRIT

I. SUMMARY

Even though the present case involves a tragic death, it is nonetheless a typical product liability action similar to dozens of others pending in the district courts of all circuits. Punitive damages in those cases are receiving widely disparate post-trial review, depending solely on the accident of geography.

This case presents this Court with the opportunity to resolve an important conflict among the circuit courts that has been spawned in the wake of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). The circuit courts have taken three different approaches to *Haslip*: The Tenth Circuit in this case, and the Fifth Circuit, have interpreted *Haslip* not to require any fundamental change in the traditional "shock the conscience" standard for post-trial review of punitive damages awards. (In *Haslip* itself, this Court suggested that the traditional standards do not satisfy due process. 111 S. Ct. at 1045 n.10.)

In contrast, the Eighth and Eleventh Circuits, and one panel of the Fourth Circuit, have interpreted *Haslip* to require a detailed and substantive review of punitive

damages awards based on the objective factors identified in *Haslip*.

Finally, another panel of the Fourth Circuit, in a striking opinion by Judge Niemeyer, held that a *Haslip* post-verdict review cannot be undertaken in federal court because of the Seventh Amendment and Fed. R. Civ. P. 59. Instead, under this third approach, the federal jury must be instructed on the *Haslip* factors.

This case is the best possible vehicle for consideration of the conflict over the application of *Haslip* in diversity cases: The Tenth Circuit was faced with a jury verdict of $25,000,000 in punitive damages, where an earlier jury in the same case, under the same instructions, had found *no* punitive damages. (This is an extreme example of the "disparate outcomes" Justice Kennedy noted in his concurring opinion in *Haslip*, 111 S. Ct. at 1055.) The jury, over objection, only heard evidence of Texaco's total wealth and income, and obviously the Plaintiff had a "windfall because [she had] the good fortune to have a defendant with a deep pocket." *Haslip*, 111 S. Ct. at 1045. The Tenth Circuit addressed *Haslip* but applied the traditional "shock the conscience" test, cutting the verdict in half by a remittitur.

There is another facet of this case, and another conflict, that warrants review by this Court: The Tenth Circuit is in conflict with the Eighth and the Fourth Circuits on the effect of an appellee's failure to cross-appeal when the case is returned to the district court for a new trial. Here the failure to cross-appeal involves punitive damages, but the same question arises in many different types of cases that are remanded for a new trial, as well as other contexts where collateral estoppel and *res judicata* are applied based upon the same considerations of finality and fairness.

Giving finality to judgments is an important principle because it implicates fundamental fairness to litigants.

Resolution of the conflict presented by this case would make for uniform results among the circuits. More importantly, a decision by this Court would also materially increase the fairness and efficiency of the judicial system by preventing litigants from sitting out the appellate process in the hope that a remand for a new trial may revive a dead claim.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE PROPER STANDARD OF REVIEW OF PUNITIVE DAMAGES AWARDS IN DIVERSITY CASES

The starting point for any analysis of the due process limits on jury awards of punitive damages is this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). That case established that the Due Process Clause imposes meaningful constraints on punitive damages awards:

> unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. . . . [G]eneral concerns of reasonableness and adequate guidance from the Court when the case is tried to a jury properly enter into the constitutional calculus.

Id. at 1043.

Although *Haslip* approved the Alabama punitive damages scheme under due process, the Court's approval depended substantially on its determination that Alabama's structured post-trial review of punitive damages awards checked the "significant discretion" given the jury to determine punitive damages. *Id.* at 1044. This post-verdict review "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.*

This Court noted that the "detailed and substantive" Alabama post-trial review of objective factors distin-

guished Alabama law from the Vermont and Mississippi schemes that provided for post-trial review of punitive damages awards only for "excessiveness" and jury "bias." *Id.* at 1045 n.10. Several Justices had criticized this limited review in the earlier cases of *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). 111 S. Ct. at 1045 n.10.

Following *Haslip*, this Court granted certiorari in twelve cases that presented questions similar to *Haslip* and summarily remanded those cases for reconsideration in light of *Haslip*.[1] This action by the Court in these

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[1] In five of the cases remanded by this Court, the punitive damages judgments have been reaffirmed by the lower courts. *Eichenseer v. Reserve Life Ins. Co.*, 111 S. Ct. 1298 (1991), *on remand*, 934 F.2d 1377 (5th Cir. 1991); *Hospital Auth. of Gwinnett County v. Jones*, 111 S. Ct. 1298 (1991), *on remand*, 409 S.E.2d 501 (1991), *cert. denied*, 60 U.S.L.W. 3578 (U.S. Feb. 24, 1992); *Southern Life & Health Ins. Co. v. Turner*, 111 S. Ct. 1678 (1991), *on remand*, 586 So.2d 854 (1991); *Transamerica Occidental Life Ins. Co. v. Koire*, 111 S. Ct. 2253 (1991), *on remand*, No. B036342, slip op. (Cal. Ct. App. Sept. 20, 1991); *Jordan v. Clayton Brokerage Co.*, 111 S. Ct. 1298 (1991), *on remand*, No. 87-1312, slip ops. (8th Cir. June 10 and 21, 1991) (remanding to district court for further consideration), *on remand*, No. 82-1107-CV-W-9, slip op. (W.D. Mo. Oct. 9, 1991), *appeal docketed*, No. 91-3606WMKC (Nov. 6, 1991).

Two courts reversed the award of punitive damages and remanded the cases for further proceedings. *George v. International Soc'y for Krishna Consciousness*, 111 S. Ct. 1299 (1991), *on remand*, 1992 Cal. App. LEXIS 105 (Cal. Ct. App. Jan. 30, 1992); *Fleming Landfill, Inc. v. Garnes*, 111 S. Ct. 2882 (1991), *on remand*, 1991 W.Va. LEXIS 215 (W.Va. Dec. 5, 1991).

Four of the remanded cases are still pending in the lower courts. *Pacific Lighting Corp. v. MGW, Inc.*, 111 S. Ct. 1299 (1991); *Intercontinental Life Ins. Co. v. Lindblom*, 111 S. Ct. 1575 (1991); *Wollersheim v. Church of Scientology*, 111 S. Ct. 1298 (1991); *AMCA Int'l Fin. Co. v. Hilgedick*, 111 S. Ct. 1614 (1991).

Finally, one of the remanded cases was dismissed subsequent to settlement by the parties. *Post Office v. Portec, Inc.*, 111 S. Ct. 1299 (1991), *vacated and appeal dismissed on remand*, 935 F.2d 1105 (10th Cir. 1991).

twelve cases shows that, while Alabama's procedures satisfy due process, any less rigorous procedures may not. A decision by this Court in this case is warranted in order that litigants in the different circuits receive similar treatment in punitive damages cases. As matters now stand, a punitive damages award that survives post-trial review in the Tenth or Fifth Circuits might well be set aside in the Fourth, Eighth, or Eleventh Circuits.

The post-*Haslip* circuit court decisions fall into three camps: (1) cases that effectively ignore *Haslip* by suggesting that the deferential post-trial review for excessiveness that "shocks the conscience" satisfies *Haslip* and due process, *Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991) *(Mason II)*; *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991); (2) cases holding that due process and *Haslip* require a rigorous post-trial review of punitive damages awards to check significant jury discretion, *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991); *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991); and *American Employers Ins. Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991); and (3) a case holding that the Seventh Amendment precludes *Haslip*-style post-trial review, but that due process requires that *Haslip* factors be included in the instructions to the jury, *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991).

The Fifth and Tenth Circuits fall into a distinct group with respect to post-*Haslip* circuit court decisions. In *Mason II*, the Tenth Circuit rejected Texaco's due process challenge to the $25,000,000 punitive damages award in the second *Mason* trial. In an opinion by Judge Barrett, joined by Chief Judge McKay and Judge Brorby, the court reviewed the district court's judgment award to determine whether the punitive damages award was "so excessive . . . as to shock the judicial conscience and to raise

an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial . . . ." *Mason II*, 948 F.2d at 1558.

This post-trial review for "excessiveness" and "passion, prejudice or bias"—which itself relies on vague, contentless and subjective standards such as whether the award "shocks the judicial conscience"—falls far short of the Alabama system of rigorous post-trial review that this Court approved in *Haslip*.

The Tenth Circuit, it is true, did find that the $25,000,000 punitive award "was so excessive as to shock our judicial conscience." 948 F.2d at 1560. The Tenth Circuit then remitted the punitive award to $12,500,000 but without any analysis of how $25,000,000 shocked the conscience when compared to the original punitive award of zero, while $12,500,000 somehow lacked conscience-shocking qualities. This application of the "shock the conscience" test violates due process because it fails to "provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." *Haslip*, 111 S. Ct. at 1045-46.

The Fifth Circuit has joined the Tenth Circuit in limiting appellate review to a traditional "excessiveness" determination. In *Eichenseer v. Reserve Life Insurance Co.*, 934 F.2d 1377 (5th Cir. 1991), the Fifth Circuit (on remand from this Court after *Haslip*) upheld a punitive damages award under Mississippi law. In that case, where the award was made by the district court sitting without a jury, the Fifth Circuit interpreted *Haslip* to require only "some meaningful procedural assurance that the amount of the award is not *an impulsive reaction*." 934 F.2d at 1385 (emphasis added). Under the Fifth Circuit's reading of *Haslip*, a punitive damages award is valid only if it is "reasonable," but the court set a low benchmark for reasonableness: "If there are *any* circumstances of probative force that support the amount of the

award, then the award meets the 'reasonableness' prong of the due process test in *Haslip.*" 934 F.2d at 1382.

In sharp contrast, the Fourth Circuit, *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991), the Eighth Circuit, *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), and the Eleventh Circuit, *American Employers Ins. Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), have all reversed punitive damages awards in diversity cases because of the absence of any "detailed and substantive" review of the verdicts of the type approved in *Haslip.*

In *Hugo's Skateway*, the Fourth Circuit reviewed a jury's punitive damages award made in a diversity case applying Virginia law. The jury's punitive award had been checked only by the district court's limited post-trial review of the award under the "excessiveness" standard that had drawn fire from the Supreme Court in *Browning Ferris, Bankers Life*, and again in footnote 10 of *Haslip.* In remanding the punitive damages award to the district court for full examination of the award under the rigorous *Haslip* standards, the Fourth Circuit observed:

> There can be little doubt that the Virginia standard is far more analogous to the schemes rejected by the *Haslip* Court in footnote 10 than they are to the Alabama scheme. We are therefore left inevitably to conclude that in order to comport with the due process requirements of the Fifth Amendment, post-trial and appellate review of punitive damage awards in the federal courts of the Fourth Circuit, based upon state statutes and common law, can no longer be conducted under Virginia's "excessiveness" standard but must instead proceed under standards similar to those enunciated by the Alabama courts in *Hammond, Green Oil*, and *Central Alabama.*

949 F.2d at 1353-54.

Similarly, the Eighth Circuit has remanded several post-*Haslip* punitive damages awards which district

courts reviewed only for "excessiveness" and "jury passion or prejudice" for the more exacting review under the criteria approved in *Haslip*. *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991); *Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422 (8th Cir. 1991); and *Union National Bank of Little Rock v. Mosbacher*, 933 F.2d 1440 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 870 (1992).

The Eleventh Circuit also interprets *Haslip* as requiring detailed post-trial review in federal diversity cases. In *American Employers Insurance Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), the Eleventh Circuit reviewed a punitive damages award made by an Alabama jury in a federal diversity case. As in the *Haslip* case, Alabama substantive law applied to plaintiff's claims. The Court remanded the case to the district court for full consideration of the *Hammond* and *Green Oil* factors that the Supreme Court approved in *Haslip*. *Id.* at 1458.

There is a third, distinctive, approach in the circuits: *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991). There, Judge Niemeyer, joined by Chief Judge Ervin, reversed a punitive damages award in a diversity action under South Carolina law and ordered a new trial, with the jury to be fully instructed on the *Haslip* standards. The court interpreted footnote 10 in *Haslip* as follows:

> While the Supreme Court in *Haslip* did not say as much, the inference is left that the broad discretion given juries under the laws of Vermont and Mississippi is not adequately checked by court review based on a standard of excessiveness. This same inference is applicable to the South Carolina scheme, where the . . . standard for court review [is] similar.

Id. at 105. The Fourth Circuit drew the conclusion that "[a]pparently, the Court in *Haslip* concurs in the assess-

ment that a standard of 'excessiveness' is not meaningful." *Id.* at 106. The court, however, found that in diversity cases the Seventh Amendment and Fed. R. Civ. P. 59 preclude the type of post-verdict review approved in *Haslip* in the state court context: "A *Haslip*-type post-trial review, insofar as it is a quasi *de novo* review by which the court reviews facts, *some of which may have not been presented to the jury*, would be inconsistent with the restrictions of the Seventh Amendment." *Id.* at 108 (emphasis added). The court's solution to the Fifth Amendment/Seventh Amendment dilemma was to direct the district court on remand to instruct the jury on the *Haslip* standards. *Id.* at 109. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 279 n.25 (Supreme Court has never held that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive).

The Tenth Circuit's decision here underscores the significance of the tripartite conflict in the circuits, because the punitive damages award could survive appellate review only under a traditional "shock the conscience" standard. Under a *Haslip* post-verdict review in the Fourth or the Eighth Circuits, the award certainly would have been struck down, and, under a *Mattison* approach, a properly instructed jury would likely have returned a dramatically different verdict.

The instruction given the jury here in fact permitted the jury virtually unlimited discretion in fixing the amount of punitive damages. *See* Punitive Damages Instruction, App. 174a. The only "guidance" the district court gave the jury concerning the amount of punitive damages was as follows:

> Any punitive damages that you award must bear some relationship to the injuries inflicted, but need not bear any relation to the amount of actual damages awarded.
>
> In determining the amount of punitive damages, you should consider the nature, extent and enormity

> of the wrong, the intent with which it was committed, and all of the circumstances surrounding the defendant's act, including plaintiff's time and expense of litigation.
>
> You may consider the financial worth of the defendant against whom such damages are awarded in determining the size of an award that is proper under the facts of this case.

Id., App. 175a.

Notably absent from this instruction is any guidance to the jury concerning a reasonable range of damages sufficient to meet the goal of punishment or deterrence, or what bounds exist on the 'relationship" that the award must bear to actual damages—in fact the jury was told the award "need not bear any relation to the amount of actual damages awarded." *Id. See Haslip*, 111 S. Ct. at 1045 (approving the Alabama requirement that there be "some understandable relationship" between compensatory damages and punitive damages). Of a similar instruction, Justice Scalia commented "[t]hat is not guidance but platitude." *Id.* at 1053 (Scalia, J., concurring).

The absence of meaningful instructions on the appropriate amount of punitive damages must be evaluated in the context of the evidence of Texaco's wealth that went to the jury. Unlike the law in Alabama, where as this Court stated plaintiffs "do not enjoy a windfall because they have the good fortune to have a defendant with deep pockets," *id.* at 1045, the Plaintiff here took full advantage of her "good fortune." The jury heard evidence from Texaco's 1988 Annual Report showing company-wide revenues exceeding $35 billion, net worth exceeding $8 billion, and net profit of $1.3 billion. At the same time, however, the district court *excluded* Texaco's evidence of its relatively small profit from selling benzene—the only Texaco product at issue. App. 125a. *See Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (noting that

"evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages" but recognizing potential for "prejudicial impact on the jury").

Thus, the district court's instruction to the jury to consider Texaco's wealth in fixing the amount of punitive damages, while excluding evidence of the profit derived from the course of conduct at issue, was directly in conflict with Alabama law applied in *Haslip* where "any evidence of Pacific Mutual's wealth was excluded" 111 S. Ct. at 1044; *see Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 278 n.24 (1989) (admission of net worth evidence is substantive law of state to be applied in federal diversity case). Rather, this Court approved Alabama's approach of considering "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss." 111 S. Ct. at 1045. *See generally* 2 American Law Institute, *Enterprise Liability for Personal Injury*, 254 (1991) (Reporters' Study) ("in determining the size of the [punitive damages] award that is sufficient . . ., what is relevant is not the defendant's *overall* wealth, but rather the profit that it realized from the particular tortious activity in question.").

The prejudicial evidence of wealth that the jury heard showed Texaco's financial situation in 1988—longer than a decade after the conduct that was found to have harmed Mr. Mason. This arbitrary use of wealth before the jury, "in effect encouraging it to impose a sizeable award," *Fact Concerns*, 453 U.S. at 270, violates due process under the principles announced in *Haslip*. Texaco was thus deprived of a very important check on unrestrained jury discretion.

Punitive damages should not be the product of a successful spin of the roulette wheel: zero today, $25 million tomorrow. Conduct judged by one jury as insufficient to warrant punitive damages should not be punished to the

tune of $25,000,000 by a second jury. As Justice Kennedy noted in his concurring opinion in *Haslip*, "nonuniformity cannot be equated with constitutional infirmity," 111 S. Ct. at 1055, but it is nonetheless true that a judicial system that tolerates the degree of "disparate outcomes," *id.*, displayed in this case must be a system that tolerates injustice.

Had this case been brought against Texaco in the Fourth, Eighth, or Eleventh Circuits, Texaco would have at least received meaningful application of the *Haslip* factors, either through the instructions to the jury or through rigorous judicial scrutiny of the award. This Court should grant certiorari to resolve the conflict in the circuits and assure that important due process safeguards are no longer dependent on the accident of geography.

III. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE EFFECT OF A PARTY'S FAILURE TO CROSS-APPEAL

Justice Cardozo held in *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937), that an appellee may not, in the absence of a cross-appeal, attack a judgment "with a view either to enlarging his own rights or of lessening the rights of his adversary" (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924) (Brandeis, J.)). Justice Cardozo's holding has an important rationale: "Failure to follow this rule would lead to the bizarre result, as stated admirably by Judge Friendly, 'that a party who has chose not to argue a point on a first appeal should stand better . . . than one who had argued and lost.'" *Laffey v. Northwest Airlines*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984) (per curiam) (quoting *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (Friendly, J.), *cert. denied*, 469 U.S. 1181 (1985)); *see Washington Post Co. v. HHS*, 865 F.2d 320, 327 n.9 (D.C. Cir. 1989) ("[T]he whole point of the rule . . . is to require that all viable arguments be vigorously pursued throughout the proceeding . . . rather than per-

mitting parties to pick and choose which claims will be presented on appeal and which will be held back until a later time.").

In the first trial here, the jury rejected Plaintiff's claim for punitive damages. She moved for a new trial on this claim, which was denied. She did not appeal. Following remand after *Mason I*, the district court ruled that Plaintiff could retry her claim for punitive damages in the second trial. App. 132a. Texaco objected on the ground that Plaintiff had appealed neither the adverse jury verdict, nor the denial of her motion for a new trial, and therefore the jury's verdict had become final. (Indeed, Texaco sought a writ of mandamus from the Tenth Circuit on this issue, which was denied. App. 128a.)

On appeal from the second trial, the Tenth Circuit affirmed the district court's decision to permit relitigation of punitive damages, following *Wheeler v. John Deere Co.*, 935 F.2d 1090 (10th Cir. 1991). The court reasoned that the remand from *Mason I* contemplated a new trial on all factual issues. App. 11a; 948 F.2d at 1552. This holding conflicts with decisions by the Fourth and Eighth Circuits. *Bethea v. Levi Strauss & Co.*, 916 F.2d 453 (8th Cir. 1990); *Arnold v. Eastern Air Lines*, 681 F.2d 186 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983).

In *Bethea*, plaintiff Bethea brought an age discrimination claim against Levi Strauss. The jury returned a verdict for Bethea on his back pay claim, but the court denied his request for reinstatement or front pay. Levi Strauss appealed; Bethea did not. The Eighth Circuit reversed the jury verdict and remanded.

On remand, Bethea moved again for reinstatement, and this time the court granted the motion. Levi Strauss again appealed. The Eighth Circuit held that Bethea's failure to appeal was fatal to the reinstatement claim:

> [The district court] had no power to increase Bethea's award for the age discrimination claim.

> When the district court issued its final order, the matter was resolved as far as the district court was concerned. Levi Strauss' appeal effected a limited revival of the matter before the Eighth Circuit. By cross-appealing, Bethea could have broadened the scope of review to include the district court's denial of his request for further relief. Bethea's failure to do so limited the appellate court's options. . . . Therefore, on remand, the district court was subject to the same limits as the appellate court and had no authority to grant Bethea further relief.

916 F.2d at 457. *See National Farmers' Organization, Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1310-11 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989).

The Fourth Circuit in *Arnold v. Eastern Air Lines*, 681 F.2d 186 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983), applied the doctrine of law of the case to reach a conclusion consistent with that in *Bethea* and in conflict with *Mason II*. In *Arnold*, a defendant appealed from an award of compensatory damages. The plaintiff, which had moved for a new trial on the question of punitive damages, chose neither to appeal nor cross-appeal. Plaintiff, however, did manifest an intent to retry punitive damages on remand. The Fourth Circuit held that retrial of that claim, decided and not appealed, was improper:

> The sole issue before the district court upon remand is that of compensatory damages. The district court's suggestion that if a new trial were ordered on appeal it would be conducted as to both punitive damage liability and compensatory damages is of no force. The district court denied plaintiffs' motion for a new trial on the punitive damages liability issue, and plaintiffs did not appeal from that order. *This ruling, unappealed, was not in consequence subject to defense by Eastern on appeal and Eastern is entitled to have it treated as law of the case.*

681 F.2d at 206 n.22 (emphasis added).

The D.C., Third, and Ninth Circuits reach results consistent with those in the Fourth and Eighth Circuits. *Laffey*, 740 F.2d at 1089-90 (failure to challenge the formula for backpay on the first appeal resulted in the appellate court's affirmance of that portion of the district court order, and the inclusion of the formula in the law of the case); *Washington Post Co.*, 865 F.2d 320 (D.C. Cir. 1989) (party could not raise anew on remand issue that it failed to pursue in appeal); *Habecker v. Clark Equipment Co.*, 942 F.2d 210, 218 (3d Cir. 1991) (issues eliminated by district court's earlier orders, not pursued on appeal, could not be revived on remand); *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 618 (9th Cir. 1980) ("By failing to challenge the special verdict on the earlier appeal . . . defendant waived any right to question the second jury's findings on this appeal.").

The Seventh Circuit and the Federal Circuit, on the other hand, have adopted positions much closer to that of the Tenth Circuit in *Mason II* and *Wheeler*. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) ("The [Supreme] Court's mandate clearly includes retrial on all liability issues, including the question of actual malice."); *Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed. Cir. 1991) (claims court on remand was not required to adhere to its own previous rulings regarding factual issues because the rulings had "not been adopted, explicitly or implicitly, by the appellate court's judgment").

In *Mason II*, the Tenth Circuit held that "the entire issue of liability was subject to retrial" after *Mason I*, and that the punitive damages claim was "part and parcel of a liability determination" and was not an "issue separate from the balance of plaintiff's case." App. 14a; 948 F.2d at 1554. Certainly *Plaintiff* did not agree that liability for compensatory and punitive damages was such a unitary issue that neither could be tried separately: after all, she moved for a new trial on punitive damages alone following the first trial.

The net effect of the Tenth and Seventh Circuits' approach to the issue is clear: litigants like Texaco, who prevail at trial can lose on appeal without ever having the opportunity to be heard. In *Mason I*, the Plaintiff had a full and fair opportunity to litigate her punitive damage claim. She lost. She moved for a new trial on punitive damages, which the district court denied. She did not appeal either the jury's verdict or the district court's denial of her motion for new trial. In Texaco's appeal from the compensatory damage verdict, Plaintiff did not, and indeed could not in the absence of a cross-appeal, challenge the result on punitive damages. The Tenth Circuit in *Mason I* addressed absolutely nothing to do with the propriety of the verdict on the punitive damage claim. Consequently, the Tenth Circuit was in error to affirm the resurrection of that claim.

CONCLUSION

For the reasons stated above, Texaco Inc. requests this Court issue a writ of certiorari to the Tenth Circuit.

Respectfully submitted,

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March 9, 1992

91-1430

No. (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TEXACO INC.,

Petitioner,

v.

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 90-3250 and 90-3278

DIANA L. MASON, Individually and as Administrator of the Estate of OTIS W. MASON, Deceased,
Plaintiff-Appellee,

v.

TEXACO, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 78-1337-T)

[Filed Nov. 18, 1991]

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Wichita, Kansas, (Arthur R. Miller, Harvard Law School, Cambridge, Massachusetts, and Eric W. Wiechmann and William H. Narwold of Cummings & Lockwood, Harford, Connecticut, with them on the brief), attorneys for Defendant-Appellant.

Before McKAY, Chief Judge, BARRETT and BRORBY, Circuit Judges.

BARRETT, Senior Circuit Judge.

Texaco, Inc. (Texaco) appeals from a products (benzene) liability judgment following a jury trial, awarding plaintiff Diana L. Mason, (Mason), individually and as Administrator of the Estate of Otis W. Mason, (Butch), Deceased, $9,025,000 in actual damages, and $25,000,000 in punitive damages. The claims of personal injury and wrongful death were based upon Mason's contention that her husband, Butch, developed leukemia and died after being exposed to benzene produced and marketed by Texaco. Jurisdiction was based upon diversity of citizenship. 28 U.S.C. § 1332. Texaco moved for a judgment notwithstanding the verdict or for a new trial. The motion was denied. This appeal followed.

Our jurisdiction vests under 28 U.S.C. § 1291. Substantially for the reasons set forth in the district court's well-reasoned, 47-page "Opinion and Order Denying Defendant's Post Trial Motion," *Mason v. Texaco, Inc.*, 741 F. Supp. 1472 (D. Kan. 1990), (*Mason*), we affirm with one exception. We shall remand to the district court with directions to enter a remittitur order on the award of punitive damages.

Background

In June, 1974, Butch and his young wife and child left Wichita, Kansas, for Yorktown, Virginia, where Butch had decided to serve in the United States Coast Guard. As a student in training, Butch was first exposed to benzene in the water and sediment class. He was taught to use a test kit sold by Gerin Corporation which was designed and used to test the levels of water and sediment in engine oil used in Coast Guard vessels. Benzene was a solvent used as a component of the test. Thereafter, commencing in October, 1974, Butch taught the course. He was exposed to a high dosage of benzene while conducting the Gerin lube oil test. He was last exposed on January 10, 1977.

During the time period of Butch's exposure to benzene, Texaco's sole warning of the health hazards of its benzene was contained in a Material Safety Data Sheet (MSDS) which stated that "High concentrations may cause anthestic [sic] effects; prolonged chronic excessive exposure may damage blood forming organs." The same MSDS stated that 25 parts benzene per million (ppm) was the maximum safe exposure limit and that "adequate ventilation" or "local exhaust" should be used. It was not until 1979, some two years after doctors had diagnosed Butch's illness as acute myelocytic leukemia and after various agencies and/or institutes and scentific/medical publications had clearly identified the causal connection between benzene exposure and cancer, that Texaco stated that benzene was "suspected" of causing leukemia.

Butch filed suit on August 14, 1978, against the Gerin Corporation, the manufacturer of the kit used to test properties of motor oil. By later amendments, claims were also asserted against Dooner & Smith Chemical Company, Mellen Chemical, Inc., Ashland Chemical Company and Texaco, all suppliers of benzene. At trial, only Texaco and Ashland remained as defendants. At the conclusion of plaintiff's case, Ashland's motion for a di-

rected verdict was granted. The case was thus submitted against Texaco, although the other parties, with the exception of Ashland, were named on the verdict form for comparative fault purposes.

Butch died from leukemia on December 10, 1979. Mason was substituted as plaintiff in the personal injury action for pain and suffering and as plaintiff/administrator of Butch's estate in the wrongful death action. As regards the defendants, it was alleged that Butch had been exposed to benzene, manufactured and/or distributed by them and that they had failed to properly and adequately warn him of the cancer risks from benzene exposure.

At the conclusion of the four-month trial, the jury answered official verdict interrogatories, finding by a preponderance of the evidence that: Butch's leukemia was caused by exposure to benzene; the benzene which caused Butch's leukemia was produced by Texaco; Texaco either knew or should have known of scientific knowledge that benzene was considered to be cancer causing at the time of Butch's exposure; Texaco's actions were insufficient to warn its immediate purchaser of benzene of its cancer propensity; Texaco did not take reasonable measures to determine that its immediate purchaser, Mellen, was capable of conveying adequate warning to others in the chain of distribution of benzene; and, Texaco's failure to adequately warn Mellen or to take reasonable measure to see that Mellen passed on an adequate warning was a direct cause of Butch's leukemia.

Based upon fault at one hundred percent, the first jury attributed fault as follows:

Otis Mason	3%
U.S. Coast Guard	26%
Gerin Corporation	25%
Dooner and Smith	5%
Mellen Chemicals	6%
Texaco, Inc.	35%

The jury determined that the total actual damages on the wrongful death claim amounted to $3,500,000 based upon pecuniary damages of $3,475,000 and non-pecuniary (a $25,000 maximum under Kansas law) of $25,000. In addition, the jury returned a personal injury verdict of $5,000,000. The jury found that it was not appropriate to award punitive damages. Mason's motion for a new trial on the jury's denial of punitive damages was denied.

Texaco appealed. Mason did not cross-appeal from the district court's denial of her motion for new trial on the jury's denial of an award of punitive damages. This court reversed and remanded for a new trial because of erroneous jury instructions which obligated Texaco, contrary to Kansas law, to take reasonable steps to "see that its distributor knew and complied with its duty to inform," and to "instruct and train [its] salesmen" in conveying the health warning. We concluded that these instructions imposed a greater duty on Texaco than Kansas law required. *See Mason v. Texaco, Inc.*, 862 F.2d 242, 246-48 (10th Cir. 1988), (*Mason I*). Our remand was general, reading "The judgment is REVERSED and the case is REMANDED for a new trial." *Id.* at 250.

Upon remand, Texaco filed a motion to preclude the submission of punitive damages to the jury on retrial. Texaco argued then, as it does now, that the unappealed finding/ruling on punitive damages became the law of the case as a consequence of Mason's failure to preserve the issue by cross-appeal. The trial court denied Texaco's motion, finding that resubmission of the issue of punitive damages upon retrial was appropriate.

Following many pre-trial motion hearings and depositions, retrial commenced on September 26, 1989, and concluded with special verdict accompanied by interrogatories on January 24, 1990, approximately a four-month trial. The jury answered special verdict interrogatories, finding that by a preponderance of the evidence: Butch's

leukemia was caused by his exposure to benzene; the benzene produced by Texaco was the cause of Butch's leukemia; the benzene produced by other manufacturers did not contribute in part to Butch's leukemia; Texaco knew or should have known at the time of Butch's exposure to benzene that there existed scientific knowledge that benzene was cancer-causing; the actions taken by Texaco were insufficient and inadequate to warn Texaco's immediate purchaser, Mellen, of the dangerous carcinogenic propensity of benzene; Texaco did not take reasonable measures to determine that its immediate purchaser, Mellen, was capable of conveying adequate warning to others in the chain of distribution of benzene; Texaco's negligent failure to warn caused, either in whole or in part, Butch's exposure to benzene; and, considering all of the fault at one hundred percent, the evidence dictates that Texaco was 100% at fault and that none of the fault, as a contributing cause to Butch's leukemia, was attributable to Ashland Chemical, Union Amoco, Mellen Chemicals, Dooner & Smith, Gerin Corp., U.S. Coast Guard or Butch.

The jury awarded Mason and her children $5,000,000 pecuniary damages and $25,000 (maximum allowable) non-pecuniary damages in their wrongful death action. The jury also awarded $4,000,000 for personal injuries suffered by Butch before his death. Finally, the jury awarded $25,000,000 against Texaco as punitive damages.

The district court entered judgment in favor of Mason for $9,025,000 compensatory damages and $25,000,000 in punitive damages for a total award of $34,025,000. Texaco moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial. The motion was denied by the district court. See *Mason, supra.*

Contentions on Appeal

On appeal, Texaco contends that: (1) the trial court erred in retrying punitive damages, (2) because the Coast Guard's fault was undisputed, the trial court com-

mitted multiple critical errors in denying Texaco's motions for a directed verdict, judgment notwithstanding the verdict, or for a new trial, (3) the trial was permeated with error that cumulatively precluded Texaco from receiving a fair trial and constitutes reversible error, (4) the trial court erred by permitting speculation as to the source of benzene and by coercing the jury to reach a decision on that issue, and (5) the jury's findings of $9,025,000 actual damages and $25,000,000 punitive damages are excessive.

The appellate contentions of error were raised and presented to the trial court in Texaco's motion for judgment notwithstanding the verdict or, alternatively, for a new trial. The district court dealt with each contention in detail in *Mason, supra.* Because we affirm, with one exception, substantially for the reasons set forth in *Mason, supra,* our discussion shall be simply supplemental.

I.

Texaco argues that the trial court erred in retrying punitive damages. We review issues of law *de novo. Boise City Farmers Coop v. Palmer,* 780 F.2d 860, 866 (10th Cir. 1985).

In support of its argument, Texaco contends that (a) established principles of finality and fundamental fairness prohibited a retrial of punitive damages, (b) the first trial afforded Mason a full and fair hearing of her punitive damage claim, (c) Mason had an obligation to cross-appeal to prevent the punitive damage determination from becoming final, (d) special jury verdicts, not infected by error, uniformly are given effect on retrial, (e) the only case directly on point prohibits retrial of punitive damages, (f) policies of fairness, judicial economy, and encouraging repose support limiting retrial of issues specifically decided, and (g) the improper relitiga-

tion of punitive damages made a fair trial of Texaco's liability and the amount of actual damages impossible.

Although we shall discuss and decide Texaco's contentions, we observe that a decision rendered by this court which was not available to the district court or to the parties when they prepared their opening and reply briefs on appeal, controls the issue of the scope of the retrial in *Mason* and fully justifies the trial court's decision to retry the issue of punitive damages. That decision is *Wheeler v. John Deere Co.*, 935 F.2d 1090 (10th Cir. 1991).

In *Wheeler*, also a products liability diversity case, the jury found defendant John Deere 75% at fault and plaintiff Wheeler's employer 25% at fault. The jury calculated Wheeler's total damages at $3.1 million. The court entered judgment against John Deere for $2.3 million. Defendant John Deere appealed. We reversed and remanded for a new trial, holding that the trial court committed reversible error in key evidentiary rulings. *See Wheeler v. John Deere Co.*, 862 F.2d 1404, 1415 (10th Cir. 1988).

At the second trial, the jury found John Deere 68% at fault and Wheeler's employer 32% at fault. The jury assessed damages at $2,883,407. The district court entered judgment against John Deere in amount of $1,960,717. Plaintiff Wheeler appealed, contending, *inter alia*, that because John Deere did not appeal from the first jury's damages award of $2,325,000, he was entitled to that sum instead of the second jury's award of $1,960,717. We rejected this contention and held:

> This argument overlooks our reversal in *Wheeler I*. To 'reverse' a judgment means to 'overthrow, vacate, set aside, make void, annul, repeal, or revoke it.' *Black's Law Dictionary*, 1319 (6th Ed. 1990). A judgment reversed by a higher court is 'without any validity, force or effect, and ought never to have ex-

> isted.' *Butler v. Eaton*, 141 U.S. 240 . . . (1891). *See Leroy v. City of Houston*, 906 F.2d 1068, 1076 (5th Cir. 1990); *Rika v. Int'l Tel. & Tel. Corp.*, 533 F.2d 1053, 1054 (8th Cir. 1976). Reversal of a judgment and remand for a new trial places the parties in the same position, insofar as relief is concerned, as if the case had never been tried. *See Gospel Army v. Los Angeles*, 331 U.S. 543 . . . . (1947).
>
> In *Wheeler* I, we 'reverse[d] the judgment of the district court and remand[ed] for a new trial.' 862 F.2d at 1415. Once we reversed the original judgment incorporating the first jury's verdict and our mandate issued, the first verdict became null and void in its entirety. The district court could no more reinstate the damages portion of the first verdict than it could substitute the second jury's award with a larger sum pulled out of a magically appearing hat. *See* Dr. Seuss, *The 500 Hats of Bartholomew Cubbins* (1938).

935 F.2d at 1096.

Texaco, in its "law of the case doctrine" argument, points to the case of *Arnold v. Eastern Air Lines*, 681 F.2d 186 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983) as "an indistinguishable case." (Appellant's Brief, p. 19). We disagree.

Arnold involved, *inter alia*, a wrongful death action brought by the personal representative of a passenger who was killed in an airplane crash near Charlotte, North Carolina. Eastern, unlike Texaco, admitted liability based on "the failure of the pilots to be aware of the plane's altitude immediately prior to the crash." Plaintiff sought both compensatory and punitive damages. Eastern's pleadings conceded liability and, thus, unlike Texaco, responsibility for compensatory damages. However, Eastern denied liability for punitive damages. The *Arnold* jury returned a plaintiff's verdict for $847,000 in compensatory damages but denied punitive damages. Post-

trial motions were denied, including plaintiff's motion for new trial on the punitive damages issue.

However, the trial court determined that it had erred in submitting decedent's pain and suffering damage claim to the jury because there was insufficient evidence that decedent had survived the crash even momentarily. On that basis, the trial court ordered a new trial on the compensatory damages claim alone, conditioned upon plaintiff's refusal to accept a remittitur of $50,000. The plaintiff accepted the remittitur, and the court entered judgment in the reduced sum of $797,000.

On appeal, the court reversed, holding that: (1) the remittitur devise was improper, but plaintiff, as appellee, having accepted the remittitur, was limited to defending the judgment as entered and could not enlarge her rights under it, and (2) upon remand the district court should conduct a new trial limited to the issue of compensatory damages only. The court observed that "The district court denied plaintiff's motion for a new trial on the punitive damages liability issue, and plaintiffs did not appeal from that order. This ruling, unappealed, was not in consequence subject to defense by Eastern on appeal and Eastern is entitled to have it treated as the law of the case. *See* F. James & G. Hazard, Civil Procedure 11.5 (2d ed. 1977)." *Id.* at 206.

The instant case and *Arnold* are strikingly different. First, in *Arnold* the remand order specifically limited the new trial to determination of compensatory damages only. *Mason* I, on the other hand, was a general remand for new trial because of erroneous jury instructions as to Texaco's duty to warn and to train salesmen. 862 F.2d at 250. Thus, the entire question of Texaco's liability was at issue upon retrial. Secondly, plaintiff in *Mason* was not offered nor did she accept a remittitur of compensatory damages. Finally, and most significant, Texaco, unlike Eastern, challenged any liability on its part.

In *Mason* I, this court reversed and remanded for a new trial on the sole basis that the trial court's liability instructions imposed an impermissibly high duty to warn on Texaco. Our remand was general. This court observed that the additional issues raised by Texaco on appeal (beyond the liability instructions) were all "fact bound" and that extensive discussion thereof would be "unproductive." *Id.* Thus, as to those "additional issues," there was no appellate court determination thereof. On that predicate, there is no reason to believe that this court would have addressed the issue of punitive damages even had it been raised on cross-appeal by Mason. It, too, would have been treated as "fact bound."

When this Court issued its general mandate in *Mason* I, we reversed the first judgment and remanded for a new trial on all "fact bound" issues without limitation. Certainly liability and damages were "fact bound" issues for jury determination. Thus, the trial court, upon remand, did not abuse its discretion in ruling that all issues of liability and damages were matters to be resolved by the jury.

In *Hicks v. Gates Rubber Co.* 928 F.2d 966, 971 (10th Cir. 1991), we held that "[W]hen the further proceedings are specified in the mandate the district court is limited to holding such as are directed. When the remand is general, however, the district court is free to decide anything not foreclosed by the mandate."

And in *K-B Trucking Co. v. Riss Intern. Corp.*, 763 F.2d 1148, 1163 n.22 (10th Cir. 1985), we stated:

> A new trial on part of the issues is appropriate where 'it clearly appears that the issue to be retried is so distinct and separate from the others that a trial of it alone may be without injustice.' *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S. Ct. 513, 515, 75 L. Ed. 1188 (1931). Professors Wright and Miller explain that

> if an error at the trial requires a new trial on one issue, but this issue is separate from the other issues in the case and the error did not affect the determination of the other issues, the scope of the new trial may be limited to the single issue. *Perhaps the most common example is the grant of a new trial limited to damages when liability has been properly determined.* 11 C. Wright & A. Miller *Federal Practice and Procedure* § 2814 at 93 (1973) (footnotes omitted); *see also* J. Moore and J. Lucas, *Moore's Federal Practice*, ¶ 59.06, at 59-56 to 59-58 (1984). Professors Wright and Miller note that 'a new trial on damages only is not proper if there is reason to think that the verdict may represent a compromise among jurors with different views on whether defendant was liable or if for some other reason it appears that the error on the damage issue may have affected the determination of liability.' (Emphasis supplied).

In *Gasoline Products Co. v. Champlin Refining Co.*, *supra*, at 500, the Court reasoned that a new trial could not be based on part of the issues because "[h]ere the question of damage on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of fair trial." In *Brown v. Richard H. Wacholz, Inc.*, 467 F.2d 18, 21 (10th Cir. 1972), we reversed and remanded for a new trial on the damages issue only, holding that the liability issue was properly determined and the issues were not intermingled.

In *Delano v. Kitch*, 663 F.2d 990 (10th Cir. 1981), we held that in conducting a retrial, the trial court should follow rulings of law previously made by the court of appeals. That mandate was faithfully followed by the trial court in this case. Under the "law of the case" doc-

trine, the district court may not deviate from the appellate court's mandate; however, the district court may reconsider an issue and disregard the appellate court mandate if the subsequent trial produces substantially different evidence. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094 (11th Cir. 1987). We observe that Mason cites to *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982) for the rule that the law of the case doctrine does not apply where the evidence on retrial is substantially different than that presented at the original trial and contends:

> It cannot seriously be argued that the evidence upon retrial of this case mirrored that presented in the first. Indeed, the second trial so substantially and significantly varied from the first as to prevent meaningful comparison. As defendant must surely concede, the cultivation and development of an entirely new liability or causation expert radically altered the evidence heard by the jury. Defendant's emphasis on a theory of defense virtually ignored in the first trial, i.e., that toluene was substituted for benzene by Gerin Corporation, in addition to its new theory on the supply issue, combined to change the complexion of the case beyond recognition. Defendant in this trial shifted the focus almost exclusively to proving Texaco's product never reached Butch Mason at all.

(Appellee's Brief, p. 13).

Among the law of the case rules is the obligation of every court to honor the rulings of a court that stands higher in the hierarchical judicial structure. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4478 at 788. No violation of that rule occurred in this case. The law of the case doctrine posits that "[w]hen a court decides upon a rule of law, that decision should continue to govern the same issues in sub-

sequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). "The doctrine of law of the case comes into play only with respect to issues previously determined." *Quern v. Jordan*, 440 U.S. 332, 347 (1979). Furthermore, the law of the case doctrine is solely a rule of practice and not a limit on the power of the court. *Messinger v. Anderson*, 225 U.S. 436, 444 (1912). *See also Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981) (law of the case doctrine is not an "inexorable command" but a rule to be applied with good sense).

"The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950). *See also, Fox v. Mazda Corp. of America*, 868 F.2d 1190, 1194 (10th Cir. 1989); *Gage v. General Motors*, 796 F.2d 345, 349 (10th Cir. 1986).

A punitive damage claim is not an independent cause of action or issue separate from the balance of a plaintiff's case. It is part and parcel of a liability determination and does not have any independent being until a jury has decided, based on the preponderance of the evidence, that not only was a defendant's conduct negligent, but that it was gross, willful, wanton or malicious. Proof of gross, willful, wanton or malicious conduct by a defendant is not separate from proof of a defendant's negligence. The evidence proving negligence establishes liability and the degree of negligence is determinative in the award of punitive damages. Upon remand in this case, the entire issue of liability was subject to retrial. It was in fact resubmitted to the jury in a hard fought contest.

In light of our holding in *Wheeler v. John Deere Co.*, *supra*, and the law of the case doctrine, we hold that the trial court did not err in permitting retrial of the punitive damages claim.

II.

Texaco contends that because the Coast Guard's fault was undisputed, the trial court committed multiple critical errors in denying Texaco a directed verdict, judgment notwithstanding the verdict, or a new trial. Texaco argues that the Coast Guard's wrongful conduct was an effective intervening and superseding cause of Butch's injuries and that the jury's failure to find that the Coast Guard was at fault required that the trial court grant Texaco a new trial.

In *Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990), we stated our standard of review, which is controlling here:

> We review *de novo* the denial of a motion for judgment notwithstanding the verdict, applying the same standard of review as that used by the district court. *See, Guilfoyle v. Missouri, Kansas & Texas R. Co.*, 812 F.2d 1290, 1292 (10th Cir. 1987). 'Although we have often used different phraseology to express this standard,' the inquiry is best summarized as 'whether there is evidence upon which the jury could properly find a verdict for the party [against whom the motion is directed].' *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498-99 (10th Cir. 1984) (footnote omitted) (quoting 9 C. Wright & A. Miller, *Federal Practice and Procedure*, 2524 at 543 (1971)). In making that determination, we are obligated to view 'evidence and inferences most favorably to the nonmoving party,' *Zimmerman v. First Fed. Sav. & Loan Ass'n.*, 848 F.2d 1047, 1051 (10th Cir. 1988).
>
> Because the directed verdict/judgment notwithstanding the verdict inquiry asks whether there was evidence such that the jury could have *properly* found for the party against whom the motion is made, we must necessarily frame our analysis in terms of the

> underlying burden of proof. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 . . . (1986). ('We are convinced that the inquiry involved in a ruling necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits').

And in *Crysco Oilfield Serv. v. Hutchinson-Hayes Interm.*, 913 F.2d 850-51 (10th Cir. 1990), we stated:

> In order to reverse the trial court's decision on a motion for directed verdict, we must find that 'the evidence points but one way and is susceptible to no reasonable inferences supporting the party [opposing the motion]; we must construe the evidence and inferences most favorably to the nonmoving party.' *Zimmerman v. First Federal Sav. & Loan Ass'n.*, 848 F.2d 1047, 1051 (10th Cir. 1988).

In *Transpower Constructors v. Grand River Dam Auth.*, 905 F.2d 1413, 1416 (10th Cir. 1990), we observed:

> We will reverse the trial court's denial of either motion [a directed verdict and for judgment n.o.v.] only if, after a *de novo* review, we determine that the evidence taken in the light most favorable to the nonmoving party and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 467 (10th Cir. 1990).

Finally, we have held that the trial court's discretion as to whether to grant a new trial will not be disturbed on appeal absent an abuse of discretion. In *Garrick v. City and County of Denver*, 652 F.2d 969, 971 (10th Cir. 1981), we required a "strong showing" of the trial court's abuse of discretion. *See also Meyers v. Ideal Basic Industries, Inc.*, 940 F.2d 1379, 1383 (10th Cir. 1991); *O.E.R., Inc. v. Hickerson*, 880 F.2d 1178, 1180 (10th Cir. 1989).

Our review of the entire record on appeal leads us to conclude that there was in fact a genuine dispute relative to the Coast Guard's fault. We hold, based on our review, that the jury could conclude, as surely it did, that the Coast Guard did not know that benzene induced or caused leukemia during the time of Butch's exposure thereto. We agree with the trial court's careful review of the evidence relative to this issue. *See Mason*, 741 F. Supp. at 1484-87.

III.

Texaco argues that it was denied a fair trial due to the cumulative effect of erroneous rulings by the trial court in (a) barring cross-examination as to the credibility of plaintiff's experts, (b) allowing plaintiff to present irrelevant and highly prejudicial evidence of OSHA benzene hearings and of "other deaths" allegedly caused by the OSHA delay in lowering the occupational benzene exposure standard, (c) finding as a fact that key testimony from the first trial had been transcribed correctly, and (d) precluding cross-examination of the plaintiff regarding her inconsistent statements in prior pleadings.

"A district court possesses considerable discretion in governing the presentation of evidence, and its decisions will not be disturbed absent manifest injustice to the parties. *See Thweatt v. Ontko*, 814 F.2d 1466, 1470 (10th Cir. 1987); *see also Marsee v. U.S. Tobacco Co.*, 866 F.2d 319, 324 (10th Cir. 1989)." *Comcoa, Inc. v. NEC Telephones, Inc.*, 931 F.2d 655, 633 (10th Cir. 1991). "The admission or exclusion of evidence lies within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *Wheeler* I, 862 F.2d at 1408." *Wheeler v. John Deere Co., supra*, 935 F.2d at 1099. "[T]he admission of evidence is largely a matter of the district court's discretion. In the absence of manifest error, we will not reverse the district court's decision to admit [refuse admisison of]

evidence." *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1365 (10th Cir. 1987).

Among its contentions of error, Texaco asserts that the trial court erred in denying it the right to cross-examine the credibility of Mason's two expert epidemiologists, Drs. Wagoner and Infante. These experts were critical of Texaco's methodology in formulating its MSDA warning. They opined that it was inadequate and that because exposure to benzene at low levels was known to cause leukemia in 1973, a prudent manufacturer of benzene would not have relied on Texaco's MSDA warning. In order to attack the credibility of Drs. Wagoner and Infante, Texaco sought, during cross-examination, to question them relative to hearsay documents prepared by other expert epidemiologists which were highly critical of a study and conclusions made by Drs. Wagoner and Infante relative to the carcinogenicity of beryllium.

Texaco argues that "[h]ad Texaco been allowed to question Infante and Wagoner about the reviews of their beryllium study, it would have been obvious to the trier of fact that these scientists were biased advocates who consistently have misrepresented data in order to reach desired conclusions. It certainly bore on their qualifications to represent views of the 'scientific community.'" (Brief of Appellant, p. 50).

Texaco contends that "the court erred in prohibiting this classical line of impeachment cross-examination. Rule 608(a) [Fed R. Evid.] permits an attack on credibility by using the evidence Texaco attempted to offer. Rule 608(b) also provides that specific instances of a witness' conduct, if probative of his character for truthfulness or untruthfulness, are admissible to attack that witness' credibility." (Brief of Appellant, p. 49).

The hearsay documents Texaco relied upon related to challenges to Mason's experts concerning research in a field completely unrelated to benzene. These documents

challenged Drs. Wagoner and Infante solely relating to their research conducted on beryllium. This evidence was inadmissible for several reasons. First, the authors of the documents relied upon by Texaco were not present or subject to cross-examination. Secondly, the documents do not challenge (Rule 608(a)) Dr. Wagoner's and Dr. Infante's character for truthfulness or untruthfulness, but rather, and only, their objectively in the beryllium study.

A trial court has broad discretion in determining whether evidence is properly admitted for impeachment purposes. *United States v. Brandon*, 847 F.2d 625, 629 (10th Cir. 1984).

In *United States v. Bowie*, 892 F.2d 1494, 1501 (10th Cir. 1990), we stated that:

> We might agree with this proposition if all prior incidents were more directly related to the instant case. The only possible trial use of the prior incident, however, was an evidence of a specific instance of the conduct of the witness' credibility. Such instances may never be proved by extrinsic evidence, and they can be inquired into on cross-examination only in the discretion of the trial court. Fed. R. Evid. 608 (b); *see generally McCormick on Evidence*, § 42 (E. Clearly 3d Ed. 1984).

In *United States v. Bedonie*, 913 F.2d 782, 802 (10th Cir. 1990), we defined the purpose of 608(a) evidence:

> Fed. R. Evid. 608(a) permits a party to attack the credibility of a witness by evidence in the form of opinion or reputation as to the witness's character for truthfulness or untruthfulness. The admission of this type of evidence is left to the sound discretion of the district court, which must also determine whether the evidence passes the rule 403 balancing test.

See also United States v. Rios, 611 F.2d 1335, 1350 (10th Cir. 1979).

In *United States v. Morales-Quinones*, 812 F.2d 604, 613 (10th Cir. 1987), we defined the scope of 608(b) cross-examination:

> Under Fed. R. Evid. 608(b), a defendant may impeach a Government witness by cross-examining him about specific instances of conduct not resulting in conviction if such conduct is probative of the witness' character for truthfulness or untruthfulness. Such inquiry is within the discretion of the trial court subject to rule 403. *United States v. Girdner*, 773 F.2d 257, 261 (10th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 1379 . . . (1986). . . .

In *United States v. Atwell*, 766 F.2d 416, 420 (10th Cir.), *cert. denied*, —— U.S. ——, 106 S. Ct. 251 (1985), we affirmed the district court's refusal to permit the defense to cross-examine a prosecution witness concerning his prior arrests which did not result in convictions and held:

> The appellant argues that Federal Rules of Evidence 608(b) compels the admission of the evidence of the arrests because they bear on Holden's truthfulness. Rule 608(b) does no such thing. The trial court in its discretion may allow inquiry into the prior conduct of a witness concerning his character for truthfulness. The rule does not require inquiry. Additionally, Rule 608(b) is still subject to the balancing under Rule 403 mentioned above.

Here, the "specific instances of conduct" by Mason's experts sought to be introduced by Texaco related to the beryllium study rather than the benzene study. This is a far cry from expert testimony or other impeachment evidence attacking the scientific propriety of the methodology employed by Drs. Wagoner and Infante in their benzene study and report.

We have carefully reviewed the record, the parties' briefs and the district court's decision. See *Mason*, 741

F. Supp. at 1495-1501. We hold and conclude that none of the trial court's challenged evidentiary rulings constituted a clear abuse of discretion, manifest error, or reversible error.

IV.

Texaco contends that the trial court erred by permitting (jury) speculation as to the source of benzene to which Butch was exposed to. This matter was thoroughly discussed in *Mason. Id.* at 1479-81. We agree with the trial court's reasoning.

Texaco argues that the jury was obviously guessing and speculating on its finding/conclusion that Butch had been exposed only to Texaco's benzene when, on the sixth day of jury deliberation, it sent a note to the court stating that it had become "locked" on question No. 2. Question No. 2 asked "Do you find by a preponderance of the evidence that the benzene produced by Texaco was a cause of Mason's leukemia?" The jury note to the court asked: "Why does question No. 2 on the verdict form have to be 100% yes or no when question number 8 has a place for a percentage of blame?"

Texaco contends that the trial court, rather than accepting the jury's statement that it was hung, issued a modified *Allen* instruction improperly telling the jury that "from my observation, the issues in this case can be decided on a preponderance of the evidence without difficulty." Texaco argues that this instruction impermissibly coerced or influenced the jury to find for plaintiff on this issue. Texaco asserts that when the trial court instructed the jury that it "reserved the right of course to comment or do whatever is necessary by way of further instruction to help the jury reach a verdict" that the court, in effect, advised the jury that it would not permit them to hang.

Immediately after the court gave its *Allen* instruction, the foreman of the jury requested dismissal, on the basis that the stress of deliberations was threatening to his

health. Texaco requested leave to question the jury foreman. The court denied the request, dismissed the foreman and denied Texaco's motion for mistrial. Texaco argued that by dismissing the jury foreman, it was denied a unanimous verdict under Fed. R. Civ. P. 48. We find no error in the trial court's *Allen* instruction or the dismissal of the jury foreman.

(a)

In *Reazin v. Blue Cross and Blue Shield of Kansas*, 899 F.2d 951, 978 (10th Cir. 1990), we reiterated the rule laid down in *United States v. McKinney*, 822 F.2d 946, 951 (10th Cir. 1987) that although the preferred procedure is that an *Allen* instruction be given at the same time as other instructions, it is not a per se rule, and the coercive effect of the *Allen*-type instruction must be determined on a case-to-case basis. Texaco does not point to any specific error in the trial court's *Allen* instruction; rather, Texaco argues that the giving of the instruction was coercive in light of the jury's inability to resolve the evidence as to whether Texaco's benzene was the cause of Butch's leukemia.

Contrary to Texaco's contentions, we do not discern any evidence or any reasonable inference that the jury was deadlocked on this issue. The jury's correspondence with the court asked "why does question No. 2 on the verdict form have to be 100% yes or no when question number 8 has a place for a percentage of blame?" The jury was obviously confused about the verdict form. In response to this question, the trial court properly instructed the jury that even should the jury answer question No. 2 in the affirmative (i.e., that benzene produced by Texaco caused Butch's leukemia), this does not answer the question of whether Texaco was at fault for causing such exposure, nor does it answer the question of the percentage of fault attributable to Texaco and other parties.

We hold that the trial court did not commit reversible error in giving the *Allen* instruction. It was not coercive. The trial court's statement that all issues in the case could be resolved was not coercive and it did not "virtually direct a verdict against Texaco on the issue of who supplied the benzene." (Brief of Appellant, p. 65). The jury continued to deliberate for another six days. That, in itself, dilutes any indicia of coercion on the part of the trial court. *See Reazin v. Blue Cross and Blue Shield of Kansas, supra; United States v. Dyba*, 554 F.2d 417 (10th Cir.), *cert. denied*, 434 U.S. 830 (1977).

(b)

Texaco argues that the trial court's *Allen* instruction, which virtually instructed the jury that a verdict must be reached, "appears to have had the effect of driving a dissenting juror off the jury." (Brief of Appellant, p. 64, n. 69). There is nothing in the record to support this assertion.

The jury foreman delivered a note to the court which the judge and counsel examined and discussed. The note explained that the jury foreman had been hospitalized about a year ago with a serious heart condition brought about as a result of stress caused by his job, resulting in early retirement. The note further explained that the juror had no idea at the outset of deliberations that he would be under the type of stress which caused his previous hospitalization. He referred the court to his doctor's letter which stated that the foreman had been recently examined and that he was suffering from "acute nervous reaction, hypertension and acute insomnia" and should be released from jury duty.

We agree with the district court's observation that under the circumstances, it would have been unconscionable to subject the jury foreman to further jury deliberation at the risk of aggravating his existing heart condition. In *Green v. Zant*, 715 F.2d 551, 555 (11th

Cir. 1983), the court held that "a federal district court possesses the discretion to remove a juror when that juror's capacity to perform his duties becomes impaired." Here, the district court had a sound factual basis upon which to exercise its discretion to remove the jury foreman and a hearing on the issue was not necessary.

V.

Texaco argues that the jury's findings of $9,025,000 actual damages and $25,000,000 punitive damages are excessive, and that the trial court abused its discretion in denying Texaco's motion for a new trial due to the excessiveness of the verdict. Our standard of review is that of abuse of discretion. *Garrick v. City and County of Denver, supra.*

Texaco contends that a review of the record will demonstrate to this court that passion, prejudice, corruption or other improper cause invaded the trial and that the jury award was so excessive as to shock the judicial conscience.

(a)

Actual Damages

With respect to the actual damages of $9,025,000 representing $5,025,000 for the wrongful death claim and $4,000,000 for Butch's survival claims, Texaco points out that Mason sought $3,500,000 under the wrongful death claim and that the jury's award exceeded that amount by $1,525,000. That award included the statutory maximum of $25,000 for bereavement and mental anguish. Of the remaining $5,000,000, a total of $1,315,561 was awarded for Butch's past and prospective lost earnings, medical expenses, nursing care and burial expenses. The balance of approximately $3,600,000 must be attributed to the economic value of the loss of services and care, which Texaco contends to be grossly excessive.

Texaco asserts that the $4,000,000 award for Butch's survival claims must be considered as compensation for

pain and suffering which occurred between September, 1977, and Butch's death in December, 1979—a period of 27 months. Texaco also points out that Butch was in remission for approximately 15 of these months during which time he was able to work, travel and engage in most normal activities. Thus, while recognizing that Butch suffered physical pain and mental anguish during this period, Texaco argues that the $4,000,000 award is disproportionately large. Texaco contends that the magnitude of the award may be explained by the "[g]ross misconduct of plaintiff's counsel in closing, when, holding up a life expectancy chart, he told the jury to use the chart in determining actual damage . . . . The trial court recognized this was error, but refused to correct the matter because compensation for pain and suffering obviously presupposes that the person was alive and thus able to experience pain . . . ." (Brief of Appellant, p. 68).

In *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985), we referred to a time-honored principle:

> It is a fundamental legal principle that the determination of the quantum of damages in civil cases is a fact-finder's function. The trier of fact, who has the first-handed opportunity to hear the testimony and to observe the demeanor of the witnesses, is clothed with a wide latitude and discretion in fixing damages pursuant to the court's instructions . . . .

In our view, there was substantial evidence in the record to support the jury's award of compensatory damages. We affirm these awards substantially for the reasons set forth in *Mason*, 741 F. Supp. at 1513-14.

(b)

Punitive Damages

Texaco argues that the $25,000,000 punitive damage award is unprecedented in a personal injury accident case in Kansas or in the Tenth Circuit. (Appellant's Brief,

n. 74, p. 69). Further, Texaco cites Kan. Stat. Ann. §§ 60-3701, 60-3702 (Supp. 1989) for the rule that $5,000,000 is the maximum punitive damage award allowed in Kansas on a tort claim since 1987.

Texaco contends that allowing the jury to assess punitive damages under a standardless punitive damage instruction on the basis that Texaco's conduct was "malicious" or "reckless," when the evidence shows that Texaco complied with government and safety organization standards, deprived Texaco of the Due Process guarantees of the Fourteenth Amendment. (Brief of Appellant, pp. 70-72).

A recent opinion of the United States Supreme Court in *Pacific Mut. Life Ins. Co. v. Haslip*, —— U.S. ——, 59 U.S.L.W. 4157 (March 5, 1991), held that a punitive damages award that was four times the amount of compensatory damages was not wanting under the Due Process Clause of the Fourteenth Amendment for vagueness where the punitive damages instruction by the trial court advised the jury that: the purpose of punitive damages was not to compensate the plaintiff for any injury but to punish the defendant; an additional purpose was to protect the public by deterring the defendant and others from doing such wrong in the future; and it must take into consideration the character and the degree of the wrong as shown by the evidence and the necessity of preventing similar wrong. *Id.* at 4161-62. Where properly instructed, as in the instant case, the Supreme Court reasoned that the jury would be enlightened as to the nature and purpose of punitive damages and that such instructions would reasonably accommodate a defendant's interest in rational decisionmaking and the state's interest in meaningful individualized assessment of appropriate deterrence and retribution. *Id. See also Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1173 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983).

Texaco acknowledges that Kansas law on the imposition of punitive damages was properly and accurately stated in the trial court's instruction. (Brief of Appellant, p. 72). *See Tetuan v. A. H. Robins Co.*, 738 P.2d 1210 (Kan. 1987). Texaco nevertheless contends, just as was argued and contended in *Haslip*, *supra*, that the instruction is "[c]ontentless and hopelessly vague regarding (1) under what circumstances punishment is warranted, (2) the relative degree of punishment to be imposed, and (3) the range within which punishment might properly be imposed." (Brief of Appellant, p. 72). Texaco also argues that because the punitive damage result on retrial involved the same conduct that the jury found not to warrant any punitive damage award during the first trial, the clear inconsistency shows that Texaco was denied due process.

The trial court, in denying Texaco's motion for j.n.o.v. or, alternatively, for a new trial, carefully reviewed Kansas law applicable to the award of punitive damages and the evidence supporting the jury's determination. The district court concluded:

> Considering all the evidence in light of the relevant factors, and giving the due deference required under Kansas law and the Seventh Amendment to the jury's determination of the amount necessary to punish and deter defendant and other manufacturers from such conduct in the future, the punitive award is not so excessive as to shock this court's judicial conscience. Thus, the court rejects defendant's contention that the punitive damage award was motivated by passion, prejudice or bias.

741 F. Supp. at 1517.

The trial court recognized that if a damages award is deemed to be excessive, but not the result of passion, prejudice or bias, the court may order a remittitur, and that such a decision rests within the sound discretion of

the trial court. *Id.* at 1514-15. The trial court correctly cited and relied upon *Malandris, supra*, 703 F.2d at 1168; *K-B Trucking Co. v. Riss Int'l Corp., supra*, 763 F.2d at 1162; and *Garrick v. City and County of Denver, supra*, 652 F.2d at 971. *Id.*

In *Malandris, supra*, we concluded that the punitive damage award was excessive and unwarranted even though passion and prejudice did not affect the jury finding of liability. We stated that "[s]ince we conclude that there is only error in the size of the punitive award, the remedy of remittitur is appropriate." 703 F.2d at 1168. Thus, a new trial was not required. On that predicate, the court ordered a remittitur to reduce the punitive award from $3,000,000 to $1,000,000. The *Malandris* court observed:

> Where the court concludes there was error only in an excessive damage award, but not one also tainting the finding of liability, the appellate court may order a remittitur and alternatively direct a new trial if the plaintiff refuses to accept the remittitur, a widely recognized remedy.

Id.

The issue of whether there is sufficient evidence to justify punitive damages is a question of law, and our review is confined to the assessment of whether the plaintiff presented evidence sufficient that a reasonable person might conclude that the defendant acted in a punitive manner. *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1384 (10th Cir. 1989); *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1456 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986). We concur with the district court's finding/conclusion that there was sufficient evidence in this case to justify the jury in finding that Texaco "knowingly embarked upon a course of conduct dangerous to the public, motivated by private gain." *Mason*, 741 F. Supp. at 1516.

The trial court agreed with Texaco "[T]hat 25 million is indeed a staggering sum." *Id.* Even so, the court did not conclude, based on all of the evidence, that the punitive damage award was so excessive as to shock the court's judicial conscience or that the award was motivated by passion, prejudice or bias. *Id.* at 1517. We agree with the district court's finding that the award was not motivated by passion, prejudice or bias. In our view, however, the award was so excessive as to shock our judicial conscience.

The trial court cited to *Folks v. Kansas Power & Light Co.*, 755 P.2d 1319, 1336 (Kan. 1988), wherein the Kansas Supreme Court identified the following as relevant factors in reviewing a jury's award of punitive damages:

> the actual damages sustained, the actual damage, award, the circumstances of the case (the nature, extent, and enormity of the wrong), the intent of the party committing it, the relative positions of the plaintiff and the defendant, the defendant's financial worth and the plaintiff's probable litigation expenses.

The trial court analyzed each of the above factors, together with the deterrent effect of the award and the ratio that the punitive damage award bears in relation to the compensatory damages award, *Mason*, 741 F. Supp. at 1515-17, and concluded that the jury performed the difficult balancing act of not allowing sympathy to overcome reason, and not allowing desire for result to overcome justice. *Id.* at 1518. While we agree with the trial court's rejection of Texaco's contention that the punitive damage award was motivated by passion, prejudice or bias, *id.* at 1517, we cannot agree that the "staggering sum" of $25,000,000 does not shock the judicial conscience.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), the Supreme Court pertinently observed that:

> In most jurisdictions jury discretion over amounts awarded is limited only by the gentle rule that they

> may not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

In his concurring opinion in *Haslip*, *supra*, Associate Justice Kennedy wrote that inconsistency in jury results can be expected for at least two reasons:

> First, the jury is empaneled to act as a decision-maker in a single case, not as a more permanent body. As a necessary consequence of this case-to-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictability. The law encompasses standards phrased at varying levels of generality . . . the standard can be more abstract and general to give the adjudicator flexibility in resolving the dispute at hand.
>
> These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity.

59 U.S.L.W. 4157 at 4167.

We observe that: even though the evidence presented during the course of the second trial in the instant case may not have been "substantially similar" to that presented during the first trial, both trials consumed about four months; plaintiff Mason sought punitive damages of $8,000,000 and the court so instructed the jury (R., Vol. VI, Tab 485, Inst. No. 1); and Mason did not file a cross-appeal with this court from the jury's finding of no punitive damages in the first trial. Thus, the jury's determination in the first trial that no punitive damages should be awarded stands in stark contrast to the $25,000,000 in punitive damages awarded by the jury against Texaco following the second trial.

It is well settled that mere excessiveness in the amount of an award may be cured by a remittitur, whereas excessiveness which results from jury passion and prejudice may not be so cured. In that case, a new trial is required. *See Melandris, supra*, at 1177-78; *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447 (10th Cir. 1987); *Karns v. Emerson Electric Co.*, 817 F.2d 1452, 1460 (10th Cir. 1987); Fed. R. Civ. P. 59; 11 Wright and Miller, *Federal Practice and Procedure*, § 2820 (1973); J. Moore, *Moore's Federal Practice*, 6A ¶ 59.08(7) (1991).

We conclude that the $25,000,000 punitive damages award is excessive and beyond a reasonable punitive award under the law of Kansas. We find the award so excessive as to shock our judicial conscience. We do not, however, conclude that the jury's liability determinations were tainted.

Thus, we conclude that a remittitur must be entered reducing the punitive award by one-half to $12,500,000. Should plaintiff Mason decline to accept a reduced judgment, there should be a new trial on all issues.

We AFFIRM the trial court's judgment, provided that the plaintiff accepts a reduction in the punitive damage award to $12,500,000. Therefore, we REMAND to the district court with directions to enter a remittitur order providing that if, within a reasonable time to be fixed by the district court, plaintiff accepts a reduction of the judgment reducing the punitive damages award from $25,000,000 to $12,500,000, then the judgment as so modified shall be final; otherwise, an order shall be entered granting a new trial on all issues.

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
C-404 United States Courthouse
1929 Stout Street
Denver, Colorado 80294

December 9, 1991

TO: ALL RECIPIENTS OF THE CAPTIONED OPINION

RE: 90-3250, 90-3278 Mason v. Texaco
Filed November 18, 1991 by Judge Barrett

Please be advised that page 5, second paragraph, lines 11 and 12 in the captioned opinion should be revised to read: "The judgment against Texaco is reversed and the case is REMANDED for a new trial." The words "against Texaco" were inadvertently omitted. Please make this correction to your copy.

Very truly yours,

ROBERT L. HOECKER
Clerk

By: /s/ Barbara Schermerhorn
BARBARA SCHERMERHORN
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 78-1337

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason,
Plaintiff,

v.

TEXACO, INC.,
Defendant.

OPINION AND ORDER DENYING DEFENDANT'S POST TRIAL MOTION

[Filed Jul. 6, 1990]

This matter is before the court on the motion of defendant Texaco for judgment notwithstanding the verdict, or alternatively, for a new trial. After the reversal and remand by the Tenth Circuit, 862 F.2d 242, the second trial in this case commenced on September 27, 1989 and lasted through closing arguments on January 3, 1990. The jury returned a verdict for plaintiff, finding defendant 100% liable for compensatory damages totaling $9,025,000 and punitive damages in the amount of $25,000,000.

Although the facts of this case have been reported in the Tenth Circuit's remand order and in a Kansas Supreme Court opinion upon certified question, *Mason v. Gerin Corp.*, 231 Kan. 718, 647 P.2d 1340 (1982), the court provides a brief background here. In September, 1977 Otis Mason was diagnosed with acute myelocytic leukemia while serving in the United States Coast Guard

at Yorktown, Virginia. In an attempt to ascertain the cause of Mason's leukemia, his treating and diagnosing physician learned that Mason had possibly been exposed to the chemical benzene while instructing students in the use of a motor oil test kit. Mason filed suit in 1978 against the immediate supplier of the test kit, alleging *inter alia*, failure to warn of the carcinogenic danger of benzene. Otis Mason died from leukemia on December 10, 1979, and his widow Diana was substituted as plaintiff in the survival action. By two amended complaints filed in 1980, Mason added various other distributors and two manufacturers of the product, including Texaco, Inc. At this second trial, only Texaco remains as a named defendant.

Defendant raises a number of factual and procedural challenges that are claimed to require a judgment notwithstanding the verdict or a new trial. It is well settled that the "district court has broad discretion in deciding whether to grant a motion for a new trial." *Patty Precision Prods. Co. v. Brown & Sharpe Mfg.*, 846 F.2d 1247, 1251 (10th Cir. 1988); *Royal College Shop v. Northern Ins. Co. of New York*, 895 F.2d 670, 677 (10th Cir. 1990). In reviewing a motion for judgment notwithstanding a verdict, the court applies the same standard governing directed verdicts. *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498 (10th Cir. 1984). It is not the function of the court to weigh the evidence or make credibility determinations. *Id* at 499. Rather, "the trial court must view the evidence most favorably to the party against whom the motion is made, and give that party the benefit of all reasonable inferences." *Id.* at 498. Thus, the court may grant a JNOV motion "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." *Q.E.R., Inc. v. Hickerson*, 880 F.2d 1178, 1180 (10th Cir. 1989).

The court will first address those issues raised by defendant which, if meritorious, would entitle it to a grant of JNOV, and will then address the procedural challenges going to the propriety of a new trial.

I. *Causation in Fact*

A. Cause of Leukemia

As a threshold question, the special verdict form asked the jury to determine whether Mason's leukemia had been caused by exposure to benzene. Defendant challenges the jury's affirmative answer on this issue, arguing that Mason's exposures to benzene and his clinical diagnosis by the treating physicians did not support an inference of causation.

The court would be able to accept defendant's contentions only by ignoring the testimony both of Mason's treating physicians and of the expert epidemiologists called by plaintiff. Basing their opinions largely on the dose and duration of dose of benzene to which Mason had been exposed while at Yorktown, these witnesses concluded that Mason's leukemia had been caused by benzene. Because no clinical test can directly and conclusively establish a link between a given case of leukemia and benzene, Mason's medical diagnosis provided only limited evidence of benzene-induced leukemia. However, Dr. Reid —the Coast Guard physician who first diagnosed Mason's leukemia—testified that acute myelocytic leukemia is one of the most common forms of leukemia associated with benzene, and that this fact aided his swift identification of the causative agent in Mason's case. Tr. Vol. 6, at 513.[1]

The court is unaware of any authority that would authorize it to reject out of hand the opinions of Mason's treating physicians and of plaintiff's experts. As a basis

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[1] As a result of Dr. Reid's efforts to identify the cause of Mason's leukemia, the Coast Guard discontinued its use of benzene shortly after Mason was diagnosed.

for rejecting the conclusions of these witnesses, defendant refers the court only to the contrary interpretation of the evidence given by defendant's experts. The proper deference to be given the jury's resolution of these conflicting opinions, however was aptly stated by the court in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984):

> Judges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low-level exposure to toxic chemicals with human disease. On questions such as these, which stand at the frontier of current medical and epidemiological inquiry, if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony.

Id. at 1554; *see also Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d at 1149, 1155 (10th Cir. 1990) (jury alone has the power to weigh and assess credibility of expert testimony on causation and judges will not retry facts); *Graham v. Wyeth Laboratories*, No. 88-1337, slip op. at 12 (10th Cir. June 25, 1990); *McMahon v. Eli Lilly & Co.*, 774 F.2d 830, 834-35 (7th Cir. 1985). It must also be borne in mind that the jury's finding, and this court's review, is governed by a standard of legal sufficiency, rather than scientific certainty. *Wells v. Ortho Pharmaceutical Corp.*, 788 F.2d 741, 745 (11th Cir.), *cert. denied*, 479 U.S. 950 (1986). Considering the substantial expert testimony based upon the evidence, the court finds defendant's argument to be meritless. Defendant had ample opportunity to develop its own experts' testimony and to test the conclusions of plaintiff's witnesses through cross examination. The jury's finding will not be disturbed.

B. Exposure to Texaco's Benzene

Defendant also challenges the jury's finding that the benzene causing Mason's leukemia was manufactured by Texaco. In a civil case such as this, product identifica-

tion need only be proven by a preponderance of the evidence. *McMahon*, 774 F.2d at 834. Additionally, under Kansas law, a defendant who seeks to reduce his fault by comparing it to the fault of an absent party has the burden of proving the other party's fault by a preponderance of the evidence. *McGraw v. Sanders Co. Plumbing & Heating*, 233 Kan. 766, 667 P.2d 289, syl. ¶ 7 (1983).[2] The procedural history of this complex factual issue is relevant to the present discussion.

Plaintiff originally sued two manufacturers of benzene whose products could have ultimately found their way to the Coast Guard facility at Yorktown: Texaco, Inc. and Ashland Chemical Company. After the close of the evidence in the first trial, this court determined that there was insufficient evidence to support a finding of exposure to Ashland's benzene, and the court granted Ashland's motion for a directed verdict. Order filed Dec. 16, 1983 (Dkt. No. 228). Accordingly, the issue of Ashland's comparative fault was not submitted to the jury in the first trial. Although Texaco raised this issue in its appeal, the Tenth Circuit did not review this court's decision, finding that new factual issues might be presented on retrial. 862 F.2d at 245.

Before and during this second trial defendant contended that it had discovered "new" evidence upon which to submit the issue of Ashland's comparative fault to the jury. Although more appropriately described as a new construction of old evidence, this court agreed with defendant and determined that Ashland, as well as a third manufacturer of benzene, should be considered by the jury as phantom defendants. Nonetheless, the jury rejected defendant's arguments and found Ashland and Union Amsco—the

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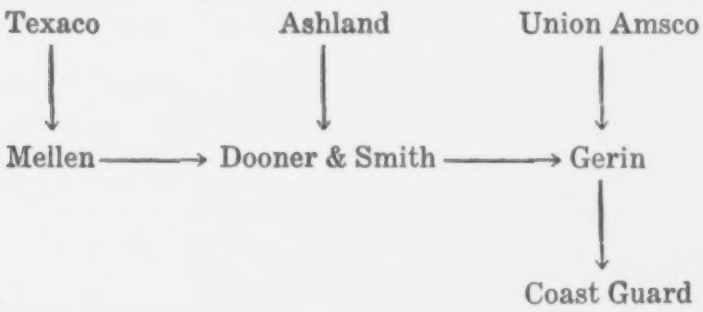
[2] The syllabus contained in Kansas Supreme Court decisions is prepared by the authoring Supreme Court Justice and is cited as authority. Kan. Stat. Ann. §§ 20-111, 20-203, 60-2106(b).

third manufacturer—to be zero percent at fault in causing Mason's death. With this background, the court turns to an examination of the facts relevant to defendant's present challenge.

The complex chain of distribution in this case can be summarized best by schematic representation:



It is unnecessary to canvass all the evidence of invoices, purchase orders, and testimony that established the flow of benzene in this distribution scheme. Although some minor disputes exist regarding the source of benzene sold by the Gerin Corporation to the Coast Guard, Texaco's argument focuses on the Coast Guard usage. Therefore, for purposes of the present motion, and viewing the evidence in a light most favorable to plaintiff, the court deems the following facts to have been established.

1. The Coast Guard at Yorktown purchased solvent for the water and sediment test kit only from the Gerin Corporation.

2. The Coast Guard purchased 6 gallons of benzene from Gerin in April 1972, and the benzene used to fill this order was manufactured by Union Amsco.

3. The Coast Guard next purchased 3 gallons of benzene in February 1973 and 4 gallons in September 1973. The benzene used to fill these orders was manufactured by Ashland.

4. The next sale of benzene to the Coast Guard was on April 4, 1974 for 4 gallons, and this benzene had been manufactured by Texaco.[3]

5. The Coast Guard next purchased 5 gallons of Texaco benzene on June 18, 1975.

6. The last two purchases of benzene were 1 gallon in November 1976, and 5 gallons in December 1976. This benzene had been manufactured by Union Amsco.

7. Otis Mason was first exposed to benzene in June 1974 as a student in the water and sediment class.

8. Mason first taught the class in October 1974, and taught a total of 4 times during this year. Over the next three years, Mason taught the class 9 times in 1975, no times in 1976 and once in 1977.

Five further pieces of evidence are relevant in determining the source of the benzene at Yorktown during the relevant times. First, there was testimony that the Coast Guard would not re-order benzene until approximately 1 to 2 gallons remained in stock. Price, Tr. Vol. 16, at 1502-04; Seligman, Tr. Vol. 52, at 6849; Kendle, Tr. Vol. 50, at 5997. Second, evidence was introduced that the rate of usage of benzene at Yorktown was approximately 6 gallons per year (or ½ gallon per month). Third, one witness testified that the Coast Guard had 15 gallons of benzene in stock at one time, although no time frame was given for this observation. Fourth, there was testimony that the Coast Guard would try to use the "oldest" benzene first, *i.e.*, that which had been in stock for the

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[3] In its present motion Texaco again submits that the "uncontroverted" testimony of the Gerin representatives establishes this sale to have been filled with toluene rather than Texaco benzene. Notwithstanding the testimony of these witnesses, the purchase order and invoice for this sale call for "benzene." Thus, the testimony of these witnesses, which was given several years after the actual sale, is sufficiently controverted by documentary evidence contemporaneously made with this sale to support the jury's verdict.

longest period of time. Finally, at the time the Coast Guard discontinued the class in September 1977, 7 gallons of benzene remained unused at Yorktown.

Plaintiff's argument is relatively straightforward. At the time of the first purchase of Texaco benzene on April 4, 1974, the Coast Guard had 1 to 2 gallons of non-Texaco benzene on hand. If the Coast Guard used the oldest solvent first, the residual amount of all non-Texaco benzene would have been gone by the time Mason was first exposed in June of 1974. Therefore, Mason would have been exposed only to Texaco benzene during the 5 classes in 1974 and also throughout the 9 classes of 1975, when only Texaco benzene was purchased. At the time Mason taught the single 1977 course, 6 gallons of Union Amsco benzene had also been purchased and were in stock at Yorktown. However, these 6 gallons were the "newest," and again under the "oldest first rule" would have been among the unused 7 gallons remaining at the time the Coast Guard stopped teaching the class.[4] Interpreting the evidence in this manner compels the conclusion that Mason was exposed only to Texaco benzene.

The new construction of the evidence given by defendant is considerably more involved. Rather than proceed-

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[4] Although there was "no evidence" that the Coast Guard did not follow a strict order of usage, it is of course possible that Mason could have been exposed to some remaining Ashland benzene in 1974 or Union Amsco benzene in 1977. The evidence of strict usage was limited to testimony that the Coast Guard would try to use the oldest first, but there were no safeguards to ensure that this procedure was always observed. *E.g.*, Tr. Vol. 45, at 5265-66. However, even if the jury were to recognize the possibility of exposure to non-Texaco benzene for failure to adhere to strict usage, it might still find that these single exposures were *de minimis* and had not contributed as a substantial factor to Mason's leukemia. *See Robertson v. Counselman*, 235 Kan. 1006, 1012, 686 P.2d 149, 153 (1984) & Instruction No. 8. On the other hand, if the jury found a strict order of usage to be credible, this evidence supports the argument that Mason was exposed only to Texaco benzene.

ing forward from the evidence indicating that the Coast Guard had one gallon of non-Texaco benzene at the time of the April 4 purchase, defendant works backwards from the September 1977 inventory. Defendant emphasizes the evidence that the Coast Guard used benzene at a rate of 6 gallons per year. Applying this constant rate of usage, the "oldest first rule," and working backwards, the Coast Guard would have used 4 gallons of Texaco benzene between January and September of 1977. Thus, Mason would have received one exposure to Texaco benzene during the single 1977 class. Under defendant's interpretation, however, the 14 exposures during 1974 and 1975 were to Union Amsco and Ashland benzene. Relying on a strict adherence to each variable, defendant concludes that the Yorktown facility was "stockpiling" benzene, and that the 1974 and 1975 purchases of Texaco benzene were not used until 1976 and 1977, when Mason taught no classes and one class, respectively.

Here again, defendant's argument rests on the proposition that the jury was required to discount all evidence and reasonable inferences unfavorable to defendant's position. The crux of defendant's argument is that its evidence of a constant rate of usage inescapably leads to the conclusion that the Coast Guard had on hand a large stockpile of benzene at the time of the purchases of Texaco benzene. The court agrees that an unfaltering acceptance of this evidence would indicate that other manufacturers' benzene was in stock during the relevant times. But the evidence of a constant usage rate of 6 gallons per year is undercut by two considerations. First, the 1977 documents relied upon by defendant emphasizes that this rate of usage was only an approximation. Plaintiff's Exh. 139L and 139D. More importantly, defendant's theory of a stockpile is directly contradicted by testimony that the Coast Guard would not restock until its benzene supply was low. This latter evidence, unlike a *post facto* approximation that assumes a constant rate of usage, is particularly persuasive because it is sup-

ported by the entirely reasonable inference that the Coast Guard's purchases are the most accurate reflection of its actual usage. As Larry Seligman opined in a written statement made in 1977, any fluctuations in the Coast Guard's actual usage of benzene were "probably based on a varying student load *or the current inventory in stock when it was reordered.*" Plaintiff's Exh. 139D (emphasis added). If the jury accepted this evidence, it could then reasonably reject a constant rate of usage and the manifold inferences made from this. Although defendant's theory is supported by *some* evidence, it falls considerably short of that degree of certainty necessary to disturb the jury's verdict. Indeed, it is small wonder that during the first trial neither the court, nor counsel for plaintiff, nor even *Texaco's* counsel was able to chart the tortuous path only recently excavated from the evidence by defendant. Faced with two conflicting and mutually exclusive interpretations of the evidence, the jury could reasonably find that the Coast Guard used benzene at widely varying rates, and that it would not reorder benzene until its supply was low. Because such a finding necessarily compels the conclusion that Mason was exposed only to Texaco benzene, the determination that only Texaco's benzene caused Mason's leukemia shall stand.[5]

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[5] Defendant also suggests that even if Mason were exposed to Texaco benzene, there is an equal probability that he was exposed to Ashland's and Union Amsco's benzene, and that plaintiff's evidence of causation therefore fails to preponderate. Dkt. No. 502, at 25. As the foregoing analysis demonstrates, however, there is persuasive evidence that only Texaco benzene was in stock during the latter half of 1974 and the entire year of 1975. Thus, contrary to defendant's assertion, the jury's assessment of fault against only Texaco is not based on mere speculation.

Assuming *arguendo* that the evidence irrefutably established the presence of other manufacturers' benzene at Yorktown during this time, the validity of defendant's argument would still be far from clear. The court doubts whether the Kansas Supreme Court would take a favorable view toward two independent wrongdoers, either or both of whom is shown to be responsible for an injury, who then

II. *Adequacy of Warning*

During the time period of Mason's exposure, the warning given by Texaco was in the form of a Material Safety Data Sheet ("MSDS"). Under a subheading titled "EFFECTS OF OVEREXPOSURE," this MSDS stated:

> High concentrations may cause anethestic [sic] effects; prolonged chronic excessive exposure may damage blood forming organs.

Defendant presents two interrelated arguments challenging the jury's finding of an inadequate warning.

First, Texaco submits that its warning adequately reflected the pre-1976 state of scientific knowledge regarding the carcinogenic hazards of benzene exposure. In 1976 the National Institute of Occupational Safety and Health ("NIOSH"), a governmental research body that advises the Department of Labor, became the first government organization to conclude that benzene is a human carcinogen, and to recommend that workplace exposure to benzene be radically reduced. Defendant contends that because the NIOSH report was not released until 1976, after Mason had received most of his classroom exposures, Texaco's warning conformed to the extant state of scientific knowledge.

The duty of a manufacturer is not as facile as defendant would have it. Kansas law imposes a continuous duty to warn, "requiring the manufacturer to keep abreast of

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seek to escape liability by blithely arguing a lack of proof as to which of them actually caused the injury. Courts confronted with this situation have regularly created a presumption of causation, thereby shifting the burden of proof to those persons whose tortious acts created the uncertainty in the first place. *E.g., Menne v. Celotex Corp.*, 861 F.2d 1453 (10th Cir. 1988) (Nebraska law). Nonetheless, because the verdict indicates that the jury found only Texaco benzene to have been in stock during the relevant times, it is unnecessary for this court to predict whether Kansas would adopt such an "alternative liability" theory of causation.

the current state of knowledge relevant to its products as gained through research, adverse reaction reports, scientific literature, and other available methods." *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, syl. ¶ 8, *cert. denied*, 469 U.S. 965 (1984). Defendant's argument, however, implies that it was required to give credence only to scientific studies issued by governmental bodies. The holding of *Wooderson* squarely refutes this suggestion. *See also Jones v. Hittle Serv., Inc.*, 219 Kan. 627, 632, 549 P.2d 1383, 1390 & syl. ¶ 2 (1976) (compliance with governmental standards is evidence of due care, but does not preclude finding negligence or defective product where reasonable to take additional precautions). Thus, in determining the state of art knowledge by which the adequacy of Texaco's 1973 warning is measured, the proper inquiry must focus on all sources of scientific knowledge.

Considering the available scientific knowledge linking benzene exposure to leukemia, the court finds ample evidence to support the jury's finding that Texaco either knew or should have known of benzene's carcinogenic properties at the time it issued its 1973 warning. Plaintiff introduced voluminous scientific publications dating back as far as 1928 that had associated benzene exposure to various cancers of the blood. Tr. Vol. 25, at 2446-543. A 1948 study commissioned by the American Petroleum Institute ("API")—a trade organization of which Texaco is a member—examined the state of art knowledge at that time and concluded that there were well-documented cases of leukemia resulting from benzene exposure. Tr. Vol. 25, at 2485-96. By the 1960's, many widely-disseminated scientific publications, including standard American medical journals and textbooks, were reporting the carcinogenic danger of benzene exposure as established through hundreds of individual cases. The literature also indicated that this danger existed even at relatively low concentrations of benzene vapor. Most significantly, Ron Richards, the Texaco industrial hygienist who

was responsible for preparing its toxic chemical warnings, candidly admitted his familiarity with much of this information. Thus, the evidence indicated that Texaco was actually aware of the large body of scientific literature linking benzene exposure to leukemia.

It matters little that Texaco and its experts dispute the conclusions of most of these pre-1973 publications. As the court held in *Wooderson*:

> Where scientific or medical evidence exists tending to show that a certain danger is associated with use of a drug, the manufacturer may not ignore or discount that information in drafting its warning solely because it finds it to be unconvincing.

235 Kan. 387, 681 P.2d 1038 at syl. ¶ 10; *see also id.* at 400, 681 P.2d at 1049 (test is not whether evidence of causation is so clear-cut that manufacturer itself is convinced of causation). The *Wooderson* court went on to state "that the duty of the manufacturer must be commensurate with the seriousness of the danger. The greater the danger, the greater the duty." *Id.* at 417, 681 P.2d at 1062.[6] Obviously, the risk of developing a fatal cancerous blood disease through benzene exposure is a great danger. And by the 1960's, epidemiologic studies indicated that a significant percentage of the population is susceptible to this danger, thus triggering the manufacturer's duty to warn. *See Restatement (Second) of Torts* § 402A comment j (1973). Although there was conflicting expert testimony interpreting the persuasiveness of the various studies, the weight to be given the opinions of these experts was exclusively for the jury.

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[6] Although the specific language of this holding refers to drug manufacturers, defendant has never suggested that the *Wooderson* decision does not also apply to manufacturers of toxic chemicals such as benzene. However, defendant does attempt to qualify the duty announced in *Wooderson* as applied to the particular facts of this case. *See supra* at section V.B.

Wilson, 893 F.2d at 1155; *Ferebee v. Chevron Chem. Co.*, 552 F. Supp. 1293, 1300 (D.D.C. 1982), *aff'd*, 736 F.2d 1529 (D.C. Cir. 1984). Given the substantial body of literature on this issue, the jury could properly find a state of scientific knowledge sufficient to require that manufacturers such as Texaco warn of the carcinogenic dangers of benzene.

Alternatively, Texaco argues that its warning adequately warned of the dangers of benzene. To the contrary, the jury could reasonably find that Texaco's warning was inadequate in several respects.

First, although the words "may damage blood forming organs" suggests *some* type of danger associated with the use of benzene, it is quite doubtful whether this language reasonably conveys the specific carcinogenic danger to which users of benzene are exposed. As set forth in Instruction No. 9a, a warning must be comprehensible to the reasonably prudent person using the product and must convey a fair indication of the *nature* and extent of the product's inherent dangers. *See Wheeler v. John Deere Co.*, 862 F.2d 1404, 1413 (10th Cir. 1988) (Kansas law); *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 819 (10th Cir. 1979) (under New Mexico law, user of a product must not only be aware of some risk, but the nature and degree of risk must be appreciated). Defendant cannot seriously argue as a matter of law that the language "may damage blood forming organs" reasonably indicates the nature of the danger at issue in this case. In fact, the proximity of this language with the warning of "anesthetic effects" might easily lead the user to conclude that damage to the blood forming organs does not differ significantly in kind from benzene intoxication.[7] Texaco's warning conveys the

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[7] Benzene intoxication refers to an immediate and potentially fatal acute poisoning that results from a sustained exposure to benzene at excessively high concentrations. Doolan, Tr. Vol. 10, at 943; Wagoner, Tr. Vol. 25, at 2487-88. *See generally Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457 (5th Cir. 1976).

true nature of the danger to which Mason succumbed only to those readers who understand that the bone marrow is the primary "blood forming organ" in adults; who further understand that the genesis of leukemia is in the cells of the bone marrow; and who further understand that "damage" in this case refers to a cellular damage consisting of an alteration in the molecular structure (or a disruption in the replication of this structure) of the genetic material of bone marrow cells in their incipient, undifferentiated stage of development—thus leading to the development of cancerous cells. Irons, Tr. Vol. 48, at 5530-95. The court is confident that such information is beyond the ken of almost anyone lacking an advanced education in the medical as well as molecular-biological sciences, and based on the evidence introduced by plaintiff the jury could properly reach the same conclusion.[8]

Second, the jury could reasonably find Texaco's warning inadequate with respect to the *extent* of the danger posed by benzene exposure. *See Long v. Deere & Co.*, 238 Kan. 766, 772-73, 715 P.2d 1023, 1028-29 (1986) (no showing that user appreciated extent of harm). Several of plaintiff's witnesses testified that the word "may" was misleading, insofar as the scientific literature recognized the benzene-leukemia association to have been conclusively established at the time Texaco issued its warning. More-

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[8] The court emphasized the jury's exclusive province on this issue in Instruction No. 12:

> The only danger of benzene with which this case is concerned is its carcinogenic danger, which is referred to as "carcinogenic propensities" throughout these instructions. "Carcinogenic propensities" means, in essense [sic], having a tendency to cause a cancerous effect, and in this case specifically means leukemia. However, when the Court refers to the "carcinogenic propensities" of benzene in these instructions, this in no way implies that Texaco was necessarily required to include the words "cancer" or "leukemia" in its warning. You are the sole judges of the adequacy of Texaco's warning, and you may either reject or accept defendant's contention that the warning it gave was adequate to warn of danger of benzene involved in this case.

over, "damage" to an organ may suggest that the injury is something which can be repaired or treated, or which may even heal itself with time. The full extent of the danger resulting from benzene exposure is not mere "damage" to an organ: it is inevitable death. In summary, the jury could reasonably find defendant's MSDS to have been so inadequate as to have been virtually no warning at all, and the court will not disturb this determination.

III. *Superceding Causes*

Defendant alleges that actions of others in the chain of distribution were, as a matter of law, intervening and superseding causes of Mason's exposure to Texaco's benzene. Issues of negligence, contributory negligence and proximate cause are all determined by the jury. *Schmeck v. City of Shawnee*, 232 Kan. 11, 27, 651 P.2d 585 (1982). "Although usually the issue of proximate cause is a question of fact for the jury, it becomes a question of law when all evidence relied upon by a party is undisputed and susceptible of only one inference." *St. Clair v. Denny*, 245 Kan. 414, 420, 781 P.2d 1043, 1047 (1989) (citation omitted). However, when the critical facts are in dispute, the issue of superseding causes is a matter for the jury to determine, and a decision as a matter of law is inappropriate. *Prince v. Leesona Corp.*, 720 F.2d 1166, 1169 (10th Cir. 1983). Questions regarding the existence of intervening and superseding causes are determined according to the test of foreseeability. *Schmeck*, 232 Kan. 11, 651 P.2d 585, syl. ¶ 6. Thus, "[i]f the original actor should have reasonably foreseen and anticipated the intervening act causing injury in the light of the attendant circumstances, his act of negligence would be a proximate cause of the injury." *George v. Breising*, 206 Kan. 221, 227, 477 P.2d 983 (1970). Giving due regard to the jury's findings in these matters, the court turns to the specific issues raised by defendant.

A. The Coast Guard

Defendant contends that the Coast Guard knew of the dangers of benzene prior to and during the time Mason started working at the Yorktown facility. Defendant argues that this putative knowledge was a superseding cause of Mason's death, or at least required the jury to assess some degree of fault to the Coast Guard.

Ordinarily, a manufacturer has no duty to warn against dangers that are known or should be known by the user. *Long*, 238 Kan. at 772-73, 715 P.2d at 1028-29; *Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 58-60, 661 P.2d 348 (1983). If a user is already familiar with the dangerous properties of a product, any additional warning would be superfluous, and the manufacturer's failure to warn could not be a cause of any injuries resulting from use of the product. *See Hall v. Ashland Oil Co.*, 625 F. Supp. 1515, 1520-21 (D. Conn. 1986) (degree of benzene user's knowledge of specific risk was issue of disputed fact for the jury); *Menna v. Johns-Manville Corp.*, 585 F. Supp. 1178, 1184-87 (D.N.J. 1984) (under both strict liability and negligence claims, level of employer's knowledge or sophistication presents question of fact regarding superseding cause of injury), *aff'd*, 772 F.2d 895 (3d Cir. 1985). In support of its claim that the Coast Guard had actual knowledge of benzene's dangerous nature, Texaco relies primarily on information contained in the Coast Guard safety manual and on the testimony Kenneth Doolan—the Coast Guard's manager of industrial hygiene during the relevant times.

The Coast Guard safety manual in effect as of November 1973 listed benzene as a "toxic hazard" that could cause injury to blood forming organs. Nowhere in this manual, however, is benzene clearly identified as a cancer or leukemia inducing agent. At most, this manual demonstrates that somewhere within the annals of Coast Guard safety literature there existed information similar to that

contained in Texaco's warning. Defendant produced no evidence that anyone in the Coast Guard's safety program or at the Yorktown facility understood this language to mean that exposure to benzene could cause cancer.[9] The Kansas Supreme Court has made abundantly clear that a manufacturer may not escape liability for failure to warn simply because a user has some general knowledge of a product's inherent dangers. *Long*, 238 Kan. at 772-73, 715 P.2d at 1028-29 (although user knew the reasons and purposes for seat belts, no showing that user appreciated or knew of extreme danger); *see also White v. W.G.M. Safety Corp.*, 707 F. Supp. 544, 549 (S.D. Ga. 1988) (knowledge that breathing dust was generally bad does not bar recovery for failure to warn of specific danger of silicosis from breathing sand). Standing alone, this evidence is insufficient to establish that degree of actual knowledge necessary to break the causal connection between Texaco's inadequate warning and Mason's exposure to benzene.

Nor was there any evidence that Mr. Doolan or anyone else responsible for the Coast Guard's safety program was otherwise aware of the carcinogenic properties of benzene. Defendant attempts to rely on Mr. Doolan's membership in the American Conference of Governmental Industrial Hygienists ("ACGIH") as evidence of Coast Guard knowledge. The first ACGIH report to identify benzene as a carcinogen was issued in 1975.[10] This report was in the

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[9] Mr. Doolan testified that he had a "general picture" as to the various health risks posed by benzene. Tr. Vol. 10, at 942. Conspicuously absent from Doolan's testimony was any specific recognition of the carcinogenic danger of benzene.

[10] A 1974 report issued by the ACGIH indicated by way of an asterisk that benzene was subject to notice of an intended change. Mr. Doolan testified that this notice "could have been in response to information that [ACGIH] had on [a] possible carcinogen." Tr. Vol. 11, at 1002. Notwithstanding this testimony, defendant brought out during cross examination of Mr. Doolan that the ACGIH did not clearly identify benzene as a suspect carcinogen until 1975.

form of a document that listed numerous hazardous chemicals and the specific dangers associated with each. As defendant elicted during cross examination, however, Mr. Doolan did not purport to know what the ACGIH or similar organizations were reporting at this time. Tr. Vol. 11, at 1004. Moreover, even if Mr. Doolan had been aware of this report, and had further acted instantaneously to bring this information to the attention of the Yorktown facility, it would have been too late to prevent all of Mason's exposures to benzene during 1974—and possibly many of his exposures during 1975. In short, defendant has failed to show that anyone having responsibility for the safety of Coast Guard personnel knew of benzene's carcinogenic nature prior to and during the time when Mason was exposed to Texaco benzene.

Defendant also makes several general allegations that the Coast Guard was a "sophisticated employer," to whom Texaco owed no duty to warn. This argument must also fail. Courts have regularly excused manufacturers from the duty to warn where the purchaser/employer has, or can reasonably be expected to have, special expertise in handling a potentially dangerous product. *See Mays*, 233 Kan. at 59 (no duty to instruct employer who was experienced in the highly specialized business of hooking up oil and gas wells); *Hittle*, 219 Kan. at 639, 549 P.2d at 1395 (retail distributor of propane well aware of dangerous properties of gas); *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 464 (5th Cir. 1976) (stripping crew and its employer were experienced professionals in the field of cleaning tanks that had contained benzene and knew of the dangers of benzene intoxication). Conversely, a manufacturer who sells to unspecialized users is not relieved of its normal duty to warn according to the reasonable and prudent person standard. *Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984). Under defendant's conception of the sophisticated user defense, *any* user of a chemical product would become

sophisticated if they used the product often enough and had a "general idea" that the chemical was toxic. Such an expansive interpretation of this limited defense would transform even simple housesold users into chemical experts. *See American Mutual Liability Ins. Co. v. Firestone Tire & Rubber Co.*, 799 F.2d 993, 994 (5th Cir. 1986) (purchaser or user must have certain knowledge or sophistication before manufacturer is relieved of duty to warn, and normally this is a question of fact for the jury). The Coast Guard is not in the general trade or business of "benzene handling" and cannot reasonably be charged as a matter of law with any special expertise or knowledge concerning benzene's carcinogenic properties. *See Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1092-93 (5th Cir. 1973) (dangers of asbestos not well enough known to insulation workers to reduce duty to warn), *cert. denied*, 419 U.S. 869 (1974), *cited in Pavlides*, 727 F.2d at 339; *Hall*, 625 F. Supp. at 1520.

Defendant also relies heavily on the argument that the Coast Guard violated OSHA regulations, and the Coast Guard safety manual incorporating those regulations, by failing to provide Mason with a safe workplace. What defendant neglects to recognize, however, is that neither federal nor Kansas law requires employers to protect against unknown dangers. Under Kansas law, the employer has a duty to protect only against dangers that are either known or could be discovered by the exercise of reasonable care. *Riggs v. Missouri-Kansas-Texas R.R. Co.*, 211 Kan. 795, 800, 508 P.2d 850 (1973); *see also Prince v. Leesona Corp.*, 720 F.2d 1166, 1170-71 & n.8 (10th Cir. 1983); *Murphy v. Owens-Corning Fiberglas Corp.*, 447 F. Supp. 557, 565 (D. Kan. 1977) (no evidence that manufacturer/employer knew or should have known of danger created by inhaling fiberglass particles). An employer's responsibilities under the "general duty clause" of the Occupational Safety and Health Act are similar:

Each employer—

> (1) shall furnish to each of his employees employment and a place of employment which are free from *recognized hazards* that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this Act.

29 U.S.C. § 654 (a) (emphasis added); *Brennan v. Occupational Safety & Health Review Comm'n*, 494 F.2d 460, 464 (8th Cir. 1974) ("recognized hazard" refers to hazards actually known by employer as well as those generally recognized in employer's industry). Accordingly, the Coast Guard safety manual prescribed general or local exhaust [11] for "harmful exposure" to "harmful fumes," and OSHA regulations in effect at the time required that respirators be selected on the basis of the hazard. Tr. Vol. 11, at 968-93. Although benzene was a "recognized hazard," and the Coast Guard safety manual required "suitable safe facilities" for the "storage, handling and use" of hazardous materials, the Coast Guard had only limited knowledge of the hazards of benzene. There is little doubt that the Coast Guard was aware of the dangers of benzene intoxication, or of the flammability of the chemical. Plaintiff's Exh. 139D; Doolan, Tr. Vol. 10, at 943-44. And the evidence indicated that the facilities at Yorktown were entirely adequate to protect against these known hazards. Reid, Tr. Vol. 8, at 739; Seligman, Tr. Vol. 52, at 6843. The specific carcinogenic danger that would have required measures such as local exhaust, however, was not known to the Coast Guard at the time Mason was exposed to benzene.[12]

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[11] The term "local exhaust" refers to a vacuum exhaust system that immediately removes the fumes of a chemical from a confined area such as a protective "hood."

[12] The critical distinction between the various hazards of benzene was highlighted by the deposition testimony of William Price, a

To reject the jury's assessment of no fault against the Coast Guard would require the court to find, as a matter of law, that the Coast Guard either knew or should have reasonably discovered this latent danger in benzene. This the court is unprepared to do. There was no evidence that the Coast Guard had actual knowledge of benzene's carcinogenic nature. Moreover, the Coast Guard has no special duty to inform itself through independent sources of the potential hazards posed by every chemical product that it purchases for its general use. Rather, an employer is only required to protect against dangers known or discoverable through the exercise of reasonable care. *Riggs*, 211 Kan. at 800. Under Kansas law the jury generally determines the degree of each actor's departure from their respective duty. *Prince*, 720 F.2d at 1171. As applied to this case, the jury could properly refuse to impose upon an unspecialized employer the duty to discover every danger associated with the use of benzene, and the verdict with respect to the Coast Guard is reasonable under the evidence.

B. Mellen Chemical

Defendant makes similar allegations against Mellen Chemical Company, the immediate purchaser of Texaco's benzene. Raymond Mellen was the president of a chemical

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co-worker of Mason who also taught the water and sediment test at Yorktown. After Mason had been diagnosed with leukemia, Price happened to discover a pamphlet that set forth the three major hazards of benzene: flammability; acute toxicity from breathing high concentrations with "an immediate harmful effect"; and "chronic toxicity" including "leukemia." Upon reading the word "leukemia," Price brought this knowledge to the attention of his Base Chief, Chief Seligman, and the Yorktown facility discontinued its use of benzene in the test kit. Tr. Vol. 14, at 1306-10. Chief Seligman also testified that before he knew of benzene's carcinogenic danger, he considered ventilation to be adequate if it was sufficient to prevent personnel from being overcome by fumes. Tr. Vol. 52, at 6865.

solvent distribution company that employed approximately 13 people. Defendant argues that Mellen was a superseding cause of Mason's death because Mellen was a knowledgeable dealer in benzene who failed to pass on the warning that Texaco had given him.

Defendant's attempts to characterize Mellen as a sophisticated "benzene expert" are particularly unpersuasive. Mellen held a general baccalaureate degree in biology with a minor in chemistry that he had received in 1949.[13] He had accumulated and read "a lot" of literature on the safe use and handling of benzene. There was no evidence, however, that Mellen knew of the carcinogenic hazard of benzene when he made those sales that could have reached Mason at Yorktown. To the contrary, Mellen's deposition testimony reveals that he did not know of this hazard until it was published in the Federal Register in 1977, at which time he began to include this information on his own label. Mellen's educational and business experience reveals that he was little more than a purveyor of chemical solvents, and not a "sophisticated user of benzene." Texaco's reliance on Mellen to either understand its warning or look up the crucial information himself was at best thoroughly misplaced, and at worst willful and wanton neglect. *See State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 157, 747 P.2d 1326, 1330 (1987) (intermediary/contractor may have no experience in selecting building materials and manufacturer has duty to warn those who rely on its specifications); *Pavlides*, 727 F.2d at 339 (manufacturer generally does not have the right to assume that persons using complex product will know how it is to be used). Texaco's affirmative duty under *Hittle* was to ascertain that Mellen was adequately trained, was familiar with the carcinogenic properties of benzene, and

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[13] Ron Richards from Texaco, who himself had majored in chemistry during the time period from 1955 to 1960, testified that the relationship between benzene and leukemia was not taught in the course of his own undergraduate studies. Tr. Vol. 38, at 3843-44.

was capable of passing on this information to his customers. 219 Kan. at 639, 549 P.2d at 1394. The mere assumption by Texaco that Mellen had such knowledge and capabilities is not sufficient to defeat the jury's considered judgment that something more was required of Texaco. *See American Mutual*, 799 F.2d at 994; *see also Restatement (Second) of Torts* § 388 comment n (1973) (supplier may be liable unless he ascertains character of intermediary or unless previous experience with intermediary gives supplier reason to believe that intermediary is careful).

Even assuming that Mellen would have understood the language contained in Texaco's MSDS, there is no evidence that Mellen was aware of the information contained in Texaco's MSDS, nor that Texaco's sales representative had emphasized or even mentioned this information to Mellen. When Mellen purchased benzene from Texaco, he did not receive any information with the product. Tr. Vol. 9, at 765. Rather, the Material Safety Data Sheet was sent separately from the shipment of benzene. Tr. Vol. 9, at 775. The jury could reasonably conclude that this was an inadequate method by which to warn the customers of Texaco. Kansas law imposes no *per se* duty upon a bulk seller to train its salesmen or to warn through such salesmen. *Mason*, 862 F.2d at 248. The failure to train salesmen and the failure of a salesman to make the purchaser aware of a product's inherent danger, however, may be considered by the finder of fact in determining the overall adequacy of a warning. *Id.* Thus, the jury could reasonably find that Texaco had failed to take adequate steps to bring this information to Mellen's attention. *See also W.G.M. Safety Corp.*, 707 F. Supp. at 549 (even when warning is provided, adequacy of efforts to communicate dangers of product is question for jury).

Defendant also argues that Mellen was required to pass on Texaco's MSDS, which contained certain precautionary instructions, and that the failure to do so destroyed any

causal responsibility on the part of Texaco. This argument rests on the mistaken assumption that causation for an inadequate warning is defeated where strict adherence to a manufacturer's instructions would eliminate exposure to the dangerous element of a product. In the court's view, this is simply an attempt to carve an adequate warning out of an inadequate one. Where the warnings given are unclear or inadequate to apprise of the inherent or latent dangers associated with a product, a manufacturer cannot escape liability for injury on the grounds that perfect compliance with its instructions would have prevented the injury. *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1457 (10th Cir. 1987) (quoting *Smith v. United States Gypsum Co.*, 612 P.2d 251, 253 (Okla. 1980)). Although a warning should contain precautions or instructions for a product's safe use, an adequate warning must also inform the user of the result that will follow from the failure to observe these instructions. *Ferebee v. Chevron Chem. Co.*, 552 F. Supp. 1293, 1304-05 (D.D.C. 1982), *aff'd*, 736 F.2d at 1539 (D.C. Cir. 1984); *Beauchamp v. Russell*, 547 F. Supp. 1191, 1195 n.2 (N.D. Ga. 1982) (instructions are not warnings).[14] The reason a user has no specific legal duty to use a product in accordance with the bare, unembellished instructions of an inadequate warning is that such a warning fails to impress upon the reader the nature and gravity of harm that will follow from the failure to observe the instructions. If Texaco had adequately warned of the carcinogenic danger of benzene exposure in terms understandable to the ordinary user, the users of its product might elect not to purchase benzene at all. Indeed, this is precisely the choice made by the Coast Guard when it finally learned of benzene's carcinogenic propensities.

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[14] Not only does this state the legal duty imposed upon manufacturers, it is also a duty that the jury could reasonably find based upon its own collective experience and the evidence introduced in this case. Wagoner, Tr. Vol. 28, at 2785-86.

Thus, because a user had no specific legal duty to follow the instructions of an inadequate warning, defendant cannot contend that Mellen's failure to pass on Texaco's MSDS was the legal cause of Mason's injury.[15]

For the same reason, the court rejects defendant's argument that the jury could not reasonably find Mellen to have borne no causal responsibility, even though Mellen did not pass on the information in Texaco's MSDS. A manufacturer's immediate vendee certainly has a duty to convey *adequate* warnings that it has received from the manufacturer. *Younger v. Dow Corning Corp.*, 202 Kan. 674, 451 P.2d 177 (1969); and Kansas law requires that a seller warn of those dangers of which it either knows or has reason to know. *Hittle*, 219 Kan. 627, 549 P.2d 1383, syl. ¶ 4. In this case, however, there was no evidence that Mellen had read Texaco's MSDS, and the jury could reasonably conclude that Texaco's method of conveying its warning was inadequate under the circumstances. *See Holmes v. Sahara Coal Co.*, 131 Ill. App. 3d 666, 475 N.E.2d 1383, 1386 (1985) (fact that manufacturer supplies a warning does mean that warning is adequate to shift or reduce risk inherent in product, and this determination is left to jury). Moreover, even assuming that Mellen was negligent in failing to read the MSDS sent to him separately by Texaco, defendant's argument does not relate Mason's injury to the failure of Mellen to pass on this information. As already noted, the Coast Guard safety manual itself stated that benzene could cause injury to blood forming organs. Yet no evidence was produced that anyone in the Coast Guard's

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[15] Even if the information in Texaco's MSDS, which prescribed "local exhaust" for benzene, had reached the Coast Guard, evidence indicated that this information would not have been understood. As understood by Chief Petty Officer Larry Seligman, whose duties at the Yorktown facility included safety inspection at the engineering school, "local exhaust" meant nothing more than an exchange of air that could be achieved by opening windows and turning on fans. Tr. Vol. 52, at 6859-60. *See supra* at n.11.

safety program or at Yorktown understood this language to mean that benzene is carcinogenic. Thus, the jury could reasonably find that Mellen's asserted negligence in failing to convey Texaco's warning was not a proximate cause of Mason's injury.

The salient motif among defendant's numerous arguments is that Mellen and the Coast Guard were sophisticated entities who could have looked up this information themselves. Even if the court were to conclude that Mellen and the Coast Guard were sophisticated intermediaries, defendant's efforts to defeat the jury's verdict would fail nonetheless. Under the "learned intermediary" rule, of which the physician-patient relationship is the most common example, a manufacturer has no duty to warn the ultimate user of the product. Rather, the manufacturer is entitled to rely upon the education and experience of the physician in conveying those adequate warnings provided by the manufacturer. *Wooderson*, 235 Kan. 387, 681 P.2d 1038, syl. ¶ 5. In this respect, the prescription drug rule resembles the "bulk distributor rule" announced in *Jones v. Hittle Serv., Inc.*, 219 Kan. 627, 549 P.2d 1383, syl. ¶ 6 (1976). The prescription drug rule relieves the manufacturer of all liability, however, only when the manufacturer has in fact adequately informed the physician. Additionally, although information regarding a drug's dangerous properties may be "equally available" to physicians, the law does not require them to look such information up themselves. *See Hoffman v. Sterling Drug Co.*, 485 F.2d 132, 146-47 (3d Cir. 1973) (jury should be allowed to decide efficacy of drug literature mailed to physicians where evidence indicates that such literature is generally not read); *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978, 994 (8th Cir. 1969) (reasonable trier of fact could find that sending warning letters, product cards, publishing in the Physicians' Desk Reference, and willingness to answer inquiries were not reasonable efforts to warn physicians who were inundated with such literature); *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or.

375, 528 P.2d 522, 529 & 535 n.25 (1974) (drug manufacturer must "bring warning home" to the physician, one method of which may be the use of "detail men"), *quoted in Wooderson*, 235 Kan. at 401. Thus, defendant seeks to place a burden of discovery upon Mellen and the Coast Guard that is not required even of true learned intermediaries such as doctors of medicine. *See also State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 747 P.2d 1326 (1987) (roof manufacture liable for actual and punitive damages for failure to warn architect intermediary of unsuitability of roofing material).

Defendant also suggests that it is too speculative to assume a causal connection between the numerous deficiencies of its warning and Mason's exposure to Texaco benzene. In support, defendant calls attention to the absence of any testimony by Mellen that use of the word "cancer" would have caused him to pass on a warning. The short answer to this argument is that in Kansas, an inadequate warning is presumed to have caused exposure to a dangerous product. *Wooderson*, 235 Kan. 387, 681 P.2d 1038, syl. ¶ 11.[16] Thus, even if the court were to agree that plaintiff's proof of causation is speculative, the burden is upon defendant to refute the presumption of causation. Moreover, in the court's view, any speculation on this issue is found not in the reasonable inference of causation from an inadequate warning in this case, but in the very type of testimony from Mellen that defendant alleges is necessary to establish a causal link between its inadequate warning and Mason's injury. *See Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1459 (10th Cir. 1990) (trial court could properly exclude speculative and self-

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[16] Defendant does not concede the existence of this presumption and takes great issue with the court instructing the jury in accordance with the holding of *Wooderson*. *Supra*, at section V.A.

serving statements by plaintiff that she would have heeded an adequate warning); *see also Wooderson*, 235 Kan. 387, 681 P.2d 1038, syl. ¶ 12 (what a doctor might or might not have done if adequately warned is not an element plaintiff must prove as a part of case). Similarly, the jury was not required to accept the "undisputed" testimony of Mr. Seligman, Mason's superior at Yorktown, who testified that Texaco's warning would have caught his attention. Neither Seligman nor any other witness is the incarnation of the reasonable and prudent person, by which standard the adequacy of a warning is measured. The jury could properly reject this testimony and find that defendant had failed to rebut the presumption.

Even in the absence of a presumption of causation, defendant's argument does not address the most telling evidence in support of the jury's finding of causation. There is no evidence that any person other than Texaco in the chain of distribution and use was aware of the carcinogenic danger of benzene at the relevant times. With the notable exception of Texaco, however, each entity within this chain altered its conduct when it finally learned of this danger. Mellen began to warn of the cancer hazard in 1977 as soon as he was informed through the Federal Register. Dooner & Smith ceased selling benzene also as a result of the information published in the 1977 Federal Register. Gerin and the Coast Guard first learned of benzene's carcinogenic hazard through this very case, and immediately discontinued its use. Thus, what the parties actually did, as opposed to what they would have done if they had received Texaco's MSDS, belies defendant's suggestion that an adequate warning in this case would have been to no avail.

Finally, the cursory suggestion is made that defendant cannot be held liable, because the position of Texaco, who was the first link in the chain of distribution, was ill-suited to control the content of the warning ultimately

received by the user. This fact, however, does not relieve Texaco of its duty under *Hittle* to warn its immediate purchaser. 219 Kan. at 639, 549 P.2d at 1394; *see also GAF Corp.*, 242 Kan. at 157, 747 P.2d at 1330 (although manufacturer does not deal with ultimate consumer, but with intermediary architect or contractor, manufacturer still has duty under *Wooderson* to warn). As the foregoing analysis demonstrates, a reasonable finder of fact could conclude that Texaco failed to fulfill its duty to provide an understandable warning to its customers or to otherwise ascertain the ability of its customers to warn others of benzene's carcinogenic propensities. As a manufacturer with its own independent research program, Texaco was in a far superior position to discover latent dangers in its product and to warn of these dangers. *See GAF Corp.*, 242 Kan. at 157, 747 P.2d at 1330; *see also Pavlides*, 727 F.2d at 338 (manufacturer's duty to warn is derived from the notion that warning costs very little and can prevent severe losses); *Beauchamp*, 547 F. Supp. at 1197 (manufacturer stands in best position to collect and disseminate information regarding dangers of a product); *Michalko v. Cooke Color & Chem. Corp.*, 91 N.J. 386, 451 A.2d 179, 187 (1982) (quoting *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 201-02, 447 A.2d 539, 545 (1982)). Texaco had discovered and was aware of numerous scientific studies and reports indicating a relationship between benzene exposure and cancerous blood diseases. Rather than communicate this information to its immediate purchaser, its chose to withhold it until persuaded by more conclusive evidence. Alternatively, it relied upon Mellen to discover this danger himself, either by reading and then deciphering Texaco's MSDS, or by learning of the danger through independent sources. In light of the failure of defendant even to initiate the process of information, the jury could reasonably conclude that the distributors and users of Texaco's benzene share no causal responsibility for the death of Mason.

C. The Gerin Corporation

Defendant also contends that Gerin was a superseding cause of Mason's injuries for mislabeling the benzene it sold to the Coast Guard. The Gerin label provided with the benzene sold to the Coast Guard represented conformity with specification 96 of the American Society of Testing Material ("ASTM 96"), which stated that toluene is a preferred solvent to benzene. Defendant claims that this representation was false, and that the jury erred by failing to find any fault on the part of Gerin.

The court initially notes that the "falseness" of Gerin's label is far from clear. As Albert Stewart from the Coast Guard recognized, a specification that states a preference is not the equivalent of a requirement. Tr. Vol. 20, at 1833. Moreover, there was some dispute as to whether ASTM 96 applied to lube oil such as that being tested by the Coast Guard or only to crude oil. Defendant also fails to appreciate that by shipping benzene, Gerin sold to the Coast Guard exactly what it had ordered. Nor was there any evidence that the Coast Guard relied on this representation in using the product. *See Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 469, 738 P.2d 1210, 1230 (1987) (test for fraud is whether any misrepresentation caused plaintiff's injury). But more directly to the point, defendant's argument elides any analysis of Gerin's fault with respect to its duty. Under Kansas law, a seller has a duty to warn "only when he knows or has reason to know that the product is or is likely to be dangerous for the use for which it is supplied." *Hittle*, 219 Kan. 627, 549 P.2d 1383, syl. ¶ 4. There is no evidence that Gerin had actual knowledge of benzene's carcinogenic propensities until after Mason was diagnosed as having leukemia. And as with Mellen, the jury's refusal to impose upon Gerin a constructive knowledge of this danger is reasonable.[17] Thus, even assuming that Gerin misrepresented

[17] It is possible that the constructive knowledge standard imposed upon Gerin under Kansas law has been preempted by federal com-

the product it sold to the Coast Guard, defendant has made no showing how this contributed to Mason's exposure to benzene.

IV. *Rulings*

Defendant also takes issue with a number of rulings alleged to have been erroneous and requiring a new trial.

A. Law of the Case

Defendant alleges that the doctrine of "law of the case" precluded the relitigation of the issue of punitive damages, and that submission of this issue to the jury requires a new trial. In the first trial of this case the jury awarded no punitive damages. Plaintiff moved for a new trial limited to the issue of punitive damages, and the court denied this motion. Plaintiff did not appeal this ruling, and the Tenth Circuit's decision reversing the judgment never addressed this court's denial of plaintiff's motion. On remand, defendant made a pretrial motion to exclude the issue of punitive damages in this retrial. In its pretrial motion, and again in the present motion for new trial, Texaco contends that plaintiff's failure to appeal this court's denial of a new "punitive damages" trial prevents her from relitigating this matter.

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mon law. In *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), the Court held that an independent government contractor may be held liable for defective design only if that contractor has actual knowledge of a danger unknown to the United States. *Id.* at 2518; *see also Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1487 (5th Cir.), *cert. denied*, 110 S. Ct. 327 (1989). Because defendant does not contend that Gerin had either actual or constructive knowledge of the carcinogenic danger of benzene, the court will not consider the applicability of the *Boyle* doctrine to the facts of this case. *See Dorse v. Armstrong World Indus., Inc.*, 716 F. Supp. 589 (S.D. Fla. 1989) (concluding that *Boyle* is not strictly limited to design defect cases and also applies to claims of failure to warn), *aff'd*, 898 F.2d 1487 (11th Cir. 1990).

The mandate of the Tenth Circuit in this case reversed the first judgment generally and remanded for a new trial. Normally when an appellate court vacates a judgment, neither collateral nor direct estoppel, nor the law of the case will give preclusive effect to this judgment. *No East-West Highway Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985); *see also Fox v. Mazda Corp. of Am.*, 868 F.2d 1190, 1194 (10th Cir. 1989) (law of the case doctrine applies only when there has been a final decision); *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982) (general remand by court of appeals allows district court to reconsider issues); *Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985). Thus, once a new trial is granted, preclusion does not extend "to any matter that is left open for further proceedings," but rather is "limited to matters actually resolved by the appellate court." 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4432, at 302 (1981); *see also Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (doctrine of law of the case affects only issues determined on previous appeal, and on remand lower court may consider any matters left open by appellate court's mandate).

Defendant does not contend that the first jury's denial of punitive damages itself precludes relitigation of this issue as a matter of direct or collateral estoppel. Instead, defendant relies upon the doctrine of law of the case. Unlike the various rigid rules of *res judicata*, the more amorphous concept of law of the case determines whether a court's prior decision on a rule of law should continue in force in subsequent stages of the same case. *Arizona v. California*, 460 U.S. 605, 618 (1983). As it is most frequently applied, law of the case encompasses a lower court's adherence to its own prior rulings, to the rulings of its superior court in the case, or to the rulings of another judge or court in the same case or a closely related case. 18 C. Wright, A. Miller & E. Cooper, *Fed-*

eral Practice and Procedure § 4478, at 788 (1981). Defendant bases its argument on a less common fourth aspect of the doctrine, under which courts will give preclusive effect to a ruling that could have been appealed, but has been abandoned by a failure to do so. *Id.* § 4478, at 801.

It should be noted that the law of the case doctrine is implicated here only as a result of plaintiff's motion for new trial for punitive damages and the court's previous ruling on that motion. Plaintiff did not appeal this court's denial of her motion, and defendant argues that this ruling must stand as the law of the case. Strictly speaking, this prior ruling does remain the law of the case, and the court would be no more inclined now to grant plaintiff a new trial limited to punitive damages than it was six years ago. A court may order a new trial on the grounds that the damage award is unreasonably low. *Fox Motors, Inc. v. Mazda Distributors, Inc.*, 806 F.2d 953, 961 (10th Cir. 1986); *Brown v. Richard H. Wacholz, Inc.*, 467 F.2d 18, 20-21 (10th Cir. 1972). In addition, a new trial may be properly limited to the question of damages where the damage and liability issues are distinct and separate. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931); *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1163 n.22 (10th Cir. 1985). However, these principles have developed within the context of compensatory damages, and it is doubtful whether it would ever be appropriate for a court to grant a new trial limited to relitigating the issue of punitive damages.[18] Because punitive damages are inextricably interwoven with the issue of liability, the courts have recognized that it would be impossible to order a retrial limited solely to the issue of punitive damages. *McDonald*

[18] Of course, this does not preclude the possibility of limiting a trial to the issue of punitive damages where the defendant admits liability, but disputes any claim for punitive damages. *See Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186, 190 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983).

v. Johnson & Johnson, 722 F.2d 1370, 1388 (8th Cir. 1983) (citing cases), *cert. denied*, 469 U.S. 870 (1984).

Defendant asserts that plaintiff's "procedural maneuvering" has deprived Texaco of the opportunity to defend this court's ruling denying a new trial on punitive damages. The court does not ascribe the same sinister motives to plaintiff's decision not to pursue a patently frivolous request. In any event, it would have been unnecessary for defendant to "defend" a previous ruling of law to which this court would still adhere if presented with the same question: plaintiff is not entitled to a new trial limited to the issue of punitive damages. *See Key v. Wise*, 629 F.2d 1049, 1054 (5th Cir. 1980) (applicability of law of the case necessarily depends on whether the question as to which it is asserted was decided previously by the court), *cert. denied*, 454 U.S. 1103 (1981). After the general reversal and remand by the Tenth Circuit, however, this ruling became moot, because the posture of this case had changed. By virtue of defendant's successful appeal, the court was no longer confronted with the propriety of granting plaintiff a new trial on the issue of punitive damages.

Under defendant's argument, a party who is forced to relitigate a lawsuit because of its opponent's successful appeal may never fare any better upon retrial of the issues unless that party has performed the perfunctory task of itself filing a notice of appeal on issues that have been decided adversely to it. Thus, the logical extension of this rule would mean that the second jury in this case could not find Texaco to have been more than 35% at fault and would limit plaintiff's compensatory damages against Texaco to the amount awarded in the first trial. But as the Sixth Circuit has explained, a party is not required to appeal every issue decided adversely to it in order to preserve relitigation of that issue in the event of a reversal:

> Any other rule would needlessly and astronomically proliferate the number of issues raised on appeal. If a judgment could be entirely vacated yet preclusive effect still given to issues determined at trial but not specifically appealed, appellants generally would feel compelled to appeal every contrary factual determination. Such inefficiency neither lawyers nor judges ought to court. Litigants ought to be encouraged to expend their energies on their most compelling issues and arguments, without paranoia about the preclusive effect of other issues or determinations.

Dodrill, 764 F.2d at 444. These observations apply with particular force here, in light of the frivolous nature of plaintiff's request for a new trial limited to punitive damages. Thus, the court rejects the argument that plaintiff was precluded from relitigating the punitive damage issue simply by failing to perform the futile and useless gesture of appealing this court's order.

Defendant relies on language contained in a footnote from a decision by the Fourth Circuit as a case "directly on point." In *Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983), defendant had admitted liability but disputed the amount of compensatory and exemplary damages. The jury awarded compensatory damages in an undifferentiated lump sum, but denied any punitive damages. Upon defendant's post-verdict motion, the trial court ruled that it had erred by allowing the jury to consider pain and suffering as a compensable item, and thus ordered a remittitur of the compensatory damages. The appellate court held that this remittitur was improper and remanded for a new trial on compensatory damages. In closing the court noted:

> The sole issue before the district court upon remand is that of compensatory damages. The district court's suggestion that if a new trial were ordered on appeal

> it would be conducted as to both punitive damage liability and compensatory damages is of no force. The district court denied plaintiffs' motion for a new trial on the punitive damages liability issue, and plaintiffs did not appeal from that order. This ruling, unappealed, was not in consequence subject to defense by [defendant] on appeal and [defendant] is entitled to have it treated as the law of the case.

Id. at 206 n.22.

The court believes that Texaco's reliance on this case is misplaced. The court in *Arnold* remanded only on the issue of compensatory damages. The issues underlying the defendant's liability were uncontested, and the plaintiffs had failed to appeal the trial court's denial of a new trial limited to punitive damages. In such a situation, the appellate court never had the opportunity to review any of those issues common to liability and punitive damages, and a retrial that included punitive damage liability would have required the relitigation of issues uncontested on appeal. Thus, this decision reflects little more than the policy of judicial efficiency that underlies law of the case principles generally. *Gage v. General Motors Corp.*, 796 F.2d 345, 349 (10th Cir. 1986). By contrast, Texaco's successful challenge on appeal vacated the jury's finding of liability and the issues underlying this finding. *Dodrill*, 764 F.2d at 444 (no preclusive effect given to any issues where judgment is vacated). To the extent the decision in *Arnold* is read to create a lurking procedural cul de sac into which the unwary litigant ventures at his own peril, the court rejects this holding as ill-advised *dicta*.

Even assuming that it was error to allow relitigation of punitive damages liability, the grant of an entirely new trial would be inappropriate in this case. Although defendant understandably seeks to cast this as a trial dominated by issues relevant only to punitive damages,

the court cannot agree with this characterization. As already noted, there is substantial overlap between the issues underlying punitive damages and liability, because the evidence that must be adduced to support an initial finding of liability is the same evidence considered in determining the propriety of punitive damages. In passing on the punitive damage question, the jury simply considers whether the conduct in question was sufficiently egregious to justify an award above any compensatory damages.

Moreover, as the court instructed without objection, many of the "post occurrence" evidence such as subsequent warnings issued by Texaco were admissible in any event to prove "the extent of knowledge of Texaco during the relevant time periods" and "as [an] admission of the truth of plaintiff's contention that benzene was a causative factor of leukemia." Instruction No. 24. Texaco's duty to warn is measured by what it either knew or should have known, and any evidence relating to Texaco's actual knowledge is also relevant to the underlying question of liability. In addition, Texaco has taken the hesitant position throughout this trial that the causal link between benzene exposure and leukemia is still vague and tentative. This position, however, is belied by the unequivocal admission contained in the warnings issued by Texaco in 1979, 1987, 1988, and 1989, wherein the product is clearly labeled as a "cancer hazard." Thus, the warnings issued by Texaco after 1977 were admissible for purposes other than proving the requisite "bad motive" element of punitive damages.

Plaintiff also produced evidence of Texaco's financial status, which the court recognizes is relevant only to the issue of punitive damages. Through the brief introduction of this evidence, plaintiff disclosed to the jury that Texaco, Inc. is a multi-million dollar corporation. In the court's view, the revelation of such public knowledge could hardly be deemed so prejudicial as to require a new

trial. The court admonished the jury not to consider Texaco's net worth for any purpose other than assessing punitive damages, if any, (Instruction No. 38), and the court must assume that the jury will abide by the instructions it gives. *United States v. Cardall*, 885 F.2d 656, 668 (10th Cir. 1989); *United States v. Hall*, 805 F.2d 1410, 1417 (10th Cir. 1986). Thus, even assuming error, the court concludes that this would be harmless as it relates to the determination of liability and compensatory damages. Fed. R. Civ. P. 61.

B. Accuracy of Transcript

Defendant contends that the court erred by finding as a fact disputed testimony given at the first trial of this case. Before the scheduled testimony of Ron Richards, the Texaco industrial hygienist who drafted its warnings, defendant made a motion to change one word of the transcript from Mr. Richards' testimony at the first trial. Defendant's counsel had contacted the court reporter from the first trial, who consulted his notes and decided that he had erroneously transcribed his notes on that word. The motion to alter the record was a matter of great importance to defendant, and the court held no less than three hearings entertaining defendant's motion, including an evidentiary hearing with the former reporter. After each of these hearings, the court ruled that the transcript would not be changed.

The disputed word from the first trial's transcript arose during cross-examination of Mr. Richards. In response to a question by plaintiff's counsel, Mr. Richards stated:

> Well, it might have been either when I, shortly after I got into the profession, certainly after graduate school in the early '60's it was very clear that there was some instances under some circumstances where benzene was at least *causally* associated with leukemia.

First Trial Tr. Vol. 20, at 6 (read into the record by Mr. Michaud, Tr. Vol. 39, at 3984) (emphasis added). Mr. Richards testified that he believed he said "casually" and not "causally" at the first trial some 6 years before, and that either he had misspoken or the court reporter had made an error.

As defendant correctly notes, "[t]he transcript in any case . . . shall be deemed prima facie a correct statement of the testimony taken and proceedings had. . . ." 28 U.S.C. § 753(b). The party attacking the accuracy of the transcript has the burden of overcoming the presumption of correctness. *United States v. Bergmann*, 836 F.2d 1220, 1222 (9th Cir. 1988). The court first notes that the colloquy between Mr. Richards and counsel during the first trial was devoted exclusively to the "causal" association between benzene and leukemia. Thus, defendant's insistence that Mr. Richards said "casual" appears incongruous within the context of the discussion. Moreover, the events at the evidentiary hearing on this matter demonstrated the ill-founded reliance of defendant on the court reporter to render a flawless account of what Mr. Richards had said. At this hearing, the following exchange took place between the court, plaintiff's counsel, and Mr. Gibson, the reporter who took the notes during the first trial:

> Mr. Michaud: Page nine, look at line three and we use there the word again causal as compared to casual, right?
>
> Mr. Gibson: That is true, the word causal, C.A.S.U.A.L. was used at the point.
>
> The Court: How do you pronounce it, causal, casual?
>
> Mr. Gibson: Your Honor, causal at that point. C.A.U.S.A.L.
>
> The Court: Well, my only deal is whether you pronounce it S.H. or S., causal or casual you say

casual. You use the S.H. on cause and you use the S. and he said, casual.

Mr. Gibson: Cause, that's why I'm spelling them so my pronunciation if I'm in error I'm spelling the words for the reporter.

. . . .

Mr. Michaud: And just as the Judge said a moment ago you said casual and what you really meant when you were reading was C.A.U.S.A.L., wasn't it?

Mr. Gibson: Yes.

Tr. Vol. 36, at 3561-62 & 3565; *see also* Tr. Vol. 39, at 3943-44. In fact, throughout this hearing, Mr. Gibson repeatedly mispronounced the word "causal" as if it had the "zh" sound of "casual."

Defendant ventures onto rather tenuous ground by relying on a court reporter who apparently has difficulty distinguishing between the sounds of these two words. The cassette tape recording of this testimony is no longer available, and it is therefore impossible for anyone—including Mr. Richards—to say conclusively which word was spoken over 6 years ago. Contrary to defendant's present characterization, the court did not find as a fact that the reporter had correctly transcribed the word. Indeed, although defendant's counsel implored the court to "take a side on this issue," the court declined to enter this foray and expressed no view to the jury one way or the other. Tr. Vol. 39, at 3940-44. Rather, the jury was allowed either to accept or reject Mr. Richards' testimony that he had misspoken or that the transcript was incorrect due to a reporter error. It would have been entirely appropriate to instruct the jury regarding the prima facie presumption of correctness of the transcript, but the court also refrained from doing even this much.

The court believes that its refusal to alter the record was a harmless matter beyond any principled doubt. Although defendant maintains that the difference between

"causal" and "casual" association is a matter of great moment, the court is confident that the subtleties of this distinction were sufficiently abstruse as to defy the comprehension of even the most adroit juror. Thus, the court perceives no error in refusing to find the facts requested by defendant.

C. Expert Qualifications

Defendant asserts that the court allowed unqualified experts to testify for the plaintiff. Texaco argues that Drs. Infante and Wagoner, as epidemiologists, had no qualifications to express a medical opinion regarding the cause of Mason's leukemia. Because the science of epidemiology is only concerned with disease as it manifests itself in populations, defendant contends that these epidemiologists were not competent to express an opinion on the cause of a given case of leukemia.

"A trial judge has broad discretion in determining the competency of an expert witness." *Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1458 (10th Cir. 1990). In making this determination, two general conditions must be met.

> [F]irst, the subject matter must be closely related to a particular profession, business or science and not within the common knowledge of the average layman; second, the witness must have such skill, experience or knowledge in that particular field as to make it appear that his opinion would rest on substantial foundation and would tend to aid the trier of fact in his search for truth.

Graham v. Wyeth Laboratories, No. 88-1337, slip op. at 22 (10th Cir. filed June 25, 1990) (quoting *Bridger v. Union Ry. Co.*, 355 F.2d 382, 387 (6th Cir. 1966)).

The court agrees that in many cases, "resolution of the causation issue turns on the testimony of the treating and evaluating physicians." *Sulesky v. United States*,

545 F. Supp. 426, 430 (S.D. W. Va. 1982). But individual cases of benzene related leukemia do not lend themthemselves to the same certainties as do diseases such as asbestosis, whose cause is readily attributable to a particular agent or class of agents. As every witness testifying on the causation issue conceded, it is medically impossible to establish an absolute causal link between a given case of leukemia and benzene exposure because there is simply no clinical test or examination that a physician can conduct to make this determination.

A medical degree or training does not confer any magical qualities upon those experts for both plaintiff and defendant who testified on the causation issue. In this case it is only the fortuitous acquaintance of Dr. Reid—the treating physician—with a body of *epidemiological* literature relating benzene exposure to leukemia that enabled Dr. Reid to express any opinion as to the cause of Mason's leukemia. If the jury could properly conclude that Mason developed leukemia as a result of his exposure to benzene, it would necessarily have to base its conclusion in large part upon Mason's dosage, duration of dosage, and latency periods—parameters that have been established and defined through epidemiological studies conducted by epidemiologists.[19] Thus, it would be incongruous to suggest that an epidemiologist may not express an opinion on the causation issue, while allowing the treating physician, and hence the jury, to infer causation based on precisely the same data that epidemiologists have collected and that an epidemiologist would rely on at trial. In light of the realities limiting any clinical determination of the cause of Mason's leukemia, the

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[19] Conversely, the only information that defendant's experts relied upon to reach a contrary conclusion on this issue was the dosage and latency periods of Mason's benzene exposures. Thus, if the court were to adopt defendant's apparent belief that epidemiological data is incompetent to establish the cause of Mason's leukemia, this would also preclude defendant's experts from testifying on the causation issue.

court finds that experts such as Drs. Infante and Wagoner were not only competent, but uniquely suited to express an opinion on the causation issue. Defendant's wooden application of the rule stated in *Sulesky* is unavailing as applied to the facts of this case.

The court additionally notes that defendant's reliance on *Brock v. Merrill Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (5th Cir. 1989), *modified*, 884 F.2d 166, *cert. denied*, 110 S. Ct. 1511 (1990), is misplaced. In *Brock* the court ordered dismissal of a suit brought to recover damages for birth defects alleged to have resulted from the mother's ingestion of the drug Bendectin during pregnancy. Due to "the lack of conclusive epidemiological proof" *generally* linking the drug Bendectin to birth defects, the court held that the trier of fact was unable to make a reasonable inference on the issue of causation. 874 F.2d at 313. In the present case, however, the epidemiologic proof linking benzene to leukemia is legionary, and the causation issue is whether Mason's leukemia can reasonably be linked to his exposure to benzene. Because causation in this case must be either established or refuted almost exclusively on the basis of epidemiological data, Drs. Wagoner and Infante were competent to express an opinion on this issue.

D. Prior Pleadings

Defendant also alleges error for the court's order precluding cross-examination of Mrs. Mason with the prior pleadings in this action. Defendant sought to cross-examine Mrs. Mason with these pleadings under Fed. R. Evid 801(d)(2)(C) and 613 for the purpose of disclosing adverse evidentiary admissions and also for impeaching plaintiff's assertion at trial that only Texaco was responsible for the death of her husband. In a published order, the court precluded cross-examination of Mrs. Mason with these pleadings, but also ruled that defendant could introduce the pleadings into evidence in its case in chief for the purpose of disclosing prior positions taken.

129 F.R.D. 542. This order also allowed plaintiff to introduce defendant's prior answers for the same purpose. After issuing this order, defendant declined to introduce plaintiff's pleadings into evidence. Instead, defendant made a "proffer" of the very evidence that the court had already ruled was admissible in its previous order. Defendant now challenges the court's order on two grounds.

First, defendant claims that cross examining Mrs. Mason with her earlier pleadings "was the only way defendant had of informing the jury of her inconsistent position." Dkt. No. 494, at 61. The court is perplexed by this assertion, insofar as it is irreconcilable with the specific and unambiguous directive of the court's order that defendant be allowed to read plaintiff's pleadings into evidence for the "purpose of disclosing prior positions taken." 129 F.R.D. at 547. Second, defendant contends that the court's order forced it "to choose between foregoing use of this probative, important evidence, or extending to plaintiff's counsel a license to creatively explain away the damaging position taken by plaintiff at earlier stages of this litigation." Dkt. No. 494, at 61-62. It is unclear from this argument whether defendant objects to allowing plaintiff to offer any explanation or merely an effective, coherent explanation for the absence of former parties. Regardless, the law is clear on this matter: if a party offers the pleadings of an opponent into evidence for the purpose of disclosing prior claims made or parties sued, the opponent must be given an opportunity to explain the absence of these former claims or parties. *Williams v. Union Carbide Corp.*, 790 F.2d 552, 556 (6th Cir. 1986); *Haynes v. Manning*, 717 F. Supp. 730, 733 (D. Kan. 1989) (citing *Dreier v. Upjohn Co.*, 196 Conn. 242, 247, 492 A.2d 164, 167-68 (1985)). A contrary rule would violate fundamental concepts of fairness.

Defendant's asserted fear of the jury succumbing to counsel's beguiling explanation is premised on a series of

assumptions: (1) that plaintiff's counsel would have elected to offer any explanation for the absence of the former defendants; (2) that the explanation chosen by Messrs. Michaud and Cordry, two officers of the court, would have misrepresented matters of public record in this case that had been stated orally before the court (Tr. Vol. 36, at 3574-75); and (3) that the court would have countenanced such conduct and would not have delivered a corrective instruction after closing argument. The court declines to join defendant on this quest for speculative error. Even if defendant had introduced the pleadings, it is entirely possible that plaintiff's counsel would not have addressed the issue of former parties. As the court observed in its previous order, disclosure of plaintiff's settlement with Gerin would follow once plaintiff decided to risk an incomplete explanation for the absence of the former defendants. 129 F.R.D. at 546. The "chilling" effect of this knowledge might well have counseled plaintiff's attorney to devote closing argument to more fruitful endeavors, such as discussing probative evidence.[20]

Introducing the pleadings in the manner allowed by the court did no violence to the rule that the statements made by counsel within the scope of the attorney-client relationship are admissable against the client. *Frank v. Bloom*, 634 F.2d 1245, 1251 (10th Cir. 1980). Rather, the court's order simply recognized that clients will rarely, if ever, be in a position to explain the legal theories and strategies chosen by their lawyers. If defendant considered the probative value of these pleadings to be of such weight, the court's order clearly afforded it the opportunity to use the pleadings both substantively and as impeachment evidence. The modest restriction on

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[20] Likewise, defendant had good reason for wanting to withhold from the jury the reason for the absence of former defendant Ashland, perhaps accounting for defendant's trepidation in opening the door on this matter in the first instance by introducing plaintiff's pleadings into evidence. *See* 129 F.R.D. at 546 n.1.

the manner of introducing this evidence was a proper and circumscribed use of the court's "considerable discretion in determining the conduct of a trial, including the orderly presentation of evidence." *Thweatt v. Ontko*, 814 F.2d 1466, 1470 (10th Cir. 1987); *see also Boren v. Sable*, 887 F.2d 1032, 1037 (10th Cir. 1989).

E. Impeachment of Character

Defendant alleges error for the court's refusal to allow certain impeachment of Drs. Wagoner and Infante, two of plaintiff's expert epidemiologists. During cross examination, defendant sought to impeach Dr. Wagoner's credibility with criticisms of a "beryllium" study that had been published by Wagoner and Infante. These impeaching documents had been written by another scientist and were highly critical of the conclusions reached by Infante and Wagoner regarding the carcinogenicity of beryllium. The documents referred throughout to the misleading, careless, or otherwise unprofessional "tendencies" of the authors. The court sustained plaintiff's objection to the use of these documents as improper character impeachment that would confuse the issues of this case with an undue excursion into unrelated substances.

Defendant confuses the distinction between character assassination and proper impeachment technique under the federal rules. It is conceded that the only "impeachment" purpose served by these documents is to impugn the scientific character of plaintiff's experts. Under Fed. R. Evid. 608(a), however, direct impeachment of a witness' character is limited to opinion or reputation evidence concerning that witness' character for truthfulness or untruthfulness. *See aslo United States v. Awkard*, 597 F.2d 667, 671 (9th Cir.) (opinion testimony on credibility is limited to character for truthfulness or untruthfulness), *cert. denied*, 444 U.S. 885 (1979). Defendant has also suggested that the beryllium studies are proper

impeachment under Fed. R. Evid. 608(b), which allows an attack on credibility through specific instances of conduct. It is not the conduct of plaintiff's experts that defendant seeks to use for attacking their character for truth, but rather the opinion voiced by others concerning this conduct. Counsel may no more use a scientist to make accusations of a "misleading," "careless," or "uncientific" character than if defendant sought to make these same accusations through a lay witness. The federal rules do not confer any special status upon the opinions of a scientist who believes that his colleagues' work reveals a misleading character, and such "scathing" criticisms among members of the scientific community have no more place in a courtroom than would the vitriolic, *ad hominem* arguments frequently exchanged between constitutional scholars. Once the court has determined that a witness is qualified to render an expert opinion, opposing counsel is limited by the same impeachment rules governing all witnesses.

F. Emergency Temporary Standard

Defendant also raises several specific instances in which the court is alleged to have allowed plaintiff's counsel to violate an earlier order concerning litigation involving the American Petroleum Institute ("API lawsuit"). This litigation was brought by several parties, including the API, challenging a 1977 emergency temporary standard promulgated by OSHA that established a one part per million ("1 ppm") exposure limit value for benzene in the workplace. Texaco was not a party to this lawsuit. The American Petroleum Institute, of which Texaco is a member, successfully challenged the emergency standard in the Fifth Circuit, whose ruling was upheld in an extensive opinion by the United States Supreme Court. *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980). Specifically, the Court held that OSHA had violated its statutory mandate by failing to determine whether benzene "poses a significant health

risk in the workplace and that a new, lower standard is therefore 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.' " *Id.* at 615. In 1988, OSHA issued a new standard for benezene exposure that is similar in most respects to the 1977 emergency standard.

Plaintiff sought to introduce evidence of the API's opposition to the 1977 emergency standard for the purpose of showing a "continuing course of deceptive conduct with respect to the tremendous hazards associated with exposure to benzene . . . ." Dkt. No. 381, at 8. Plaintiff asserted that Texaco had information as early as 1941 indicating that leukemia could result from benzene exposures as low as 1 ppm. In light of this knowledge, plaintiff argued that Texaco's opposition, through the API, to the emergency standard demonstrated a callous and indifferent attitude toward persons exposed to benzene in the workplace. In addition, plaintiff sought to introduce evidence of the lawsuit, and the 1988 adoption of an identical standard, to prove that 198 deaths resulted from the delay in implementing a valid regulation.

The court sustained Texaco's objection to this evidence. The court ruled that attributing a lawsuit filed by the API to defendant, solely by virtue of Texaco's membership in the API, would be tantamount to guilt by association. The court also precluded plaintiff from attempting to quantify the number of deaths that might have resulted from the delay in implementing the 1 ppm standard, on the basis of the speculative nature of such evidence.

Before addressing defendant's specific allegations of misconduct with respect to the API lawsuit, a further clarification of the court's ruling is necessary. Contrary to defendant's present assertion, the court never precluded introducing evidence of positions taken by Texaco *individually* with respect to OSHA's efforts to lower the workplace exposure limits to benzene. For several rea-

sons, the court repeatedly rejected defendant's attempts to insulate Texaco's own private actions from scrutiny under the auspices of the *Noerr-Pennington* doctrine.[21] First and foremost, Texaco was not a party to the API lawsuit. Thus, defendant's First Amendment right to petition the courts is not implicated by evidence of its own private positions expressed on other persons' lawsuits. Further, even assuming an identity between Texaco and the API, the *Noerr-Pennington* doctrine would have no applicability to this case. As stated in the seminal *Pennington* decision:

> It would of course still be within the province of the trial judge to admit this evidence [of first amendment activity] if he deemed it probative and not unduly prejudicial, under the "established judicial rule that *testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.*

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[21] The *Noerr-Pennington* doctrine originates from the Supreme Court's decisions in *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine was developed in recognition of the chilling effect on first amendment rights that would ensue if a group's assertion of these rights could then form the basis of liability in a subsequent lawsuit. Although the doctrine first evolved in the antitrust arena and initially encompassed only the first amendment right to lobby the legislative branch, the Court has extended the doctrine to protect the first amendment right to petition the courts, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and has also applied the doctrine to areas of litigation other than antitrust. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (unfair labor practice); *see also South Dakota v. Kansas City Southern Indus., Inc.*, 880 F.2d 40, 50 (8th Cir. 1989) (intentional interference with contractual relationship), *cert. denied*, 110 S. Ct. 726 (1990); *Surgidev Corp. v. Eye Tech., Inc.*, 625 F. Supp. 800, 803 (D. Minn. 1986) (tortious interference with corporation's public offering), *aff'd*, 828 F.2d 452 (8th Cir. 1987).

United Mine Workers v. Pennington, 381 U.S. 657, 670 n.3 (1965) (emphasis supplied). Accordingly, courts have invoked the doctrine only where the cause of action itself is based on the act of lobbying or filing a lawsuit. *Cf. MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F. 2d 1081, 1160 (7th Cir.) (defendant's actions before FCC admissible as evidence of the purpose and character of decisions that were relevant to charges not based on defendant's first amendment activities), *cert. denied*, 464 U.S. 891 (1983); *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1196 (8th Cir. 1982) (exempt conduct may be considered to the extent it tends to show purpose or character of nonexempt activity); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978) (evidence of activity protected by *Noerr* doctrine admissible to show purpose and character of other non-protected activity if not unduly prejudicial), *cert. denied*, 444 U.S. 924 (1979). Because plaintiff's claim of failure to warn adequately is based on actions other than the API lawsuit, evidence of Texaco's own position regarding this lawsuit does not fall within the proscriptive sweep of *Noerr-Pennington*.

To the extent that defendant's present objections go to the very mention of OSHA's benzene emergency standard, the foregoing clarification dispenses with such arguments. The court only precluded attribution of the API lawsuit to Texaco as evidence of Texaco's state of mind. As to Texaco's own individual actions, however, Texaco's express opposition to this standard, in light of its purported knowledge of the necessity of a 1 ppm limit, would indicate a conscious indifference for workplace safety relevant to the issue of punitive damages. Fed. R. Evid. 404(b).

Defendant raises two instances of a violation of the court's ruling. During cross-examination of defendant's expert Dr. Labarthe, plaintiff's counsel posed the following question:

> And what really has happened so we can get the full picture, Dr. Labarthe, is that when the parts per million and the ceiling limit was gradually coming down, eventually in the mid seventies *Texaco*, Gulf, Exxon and other petrochemical companies, *through the API* started hiring people like you to do a review of the existing studies in an attempt to justify keeping the level at 10 parts per million, isn't that what happened?

Tr. Vol. 56, at 7310-11. At this point, defendant objected and was promptly sustained by the court. As this excerpt reveals, plaintiff's counsel impermissibly attempted to attribute the API's actions to Texaco. The court considers this infraction to have been harmless within the context of the entire trial. The jury was repeatedly admonished that the statements of counsel are not evidence. In addition, the context in which this question was asked was an ongoing attempt by plaintiff's counsel to establish possible bias on the part of Dr. Labarthe, who began working on a benzene-leukemia study for the API in late 1985.

Defendant also alleges prejudicial error for the following question asked of Dr. Labarthe regarding "the Tabershaw study":

> Mr. Michaud: Was one of [the study's] purposes to try and gather data so that the ceiling limit and the parts per million permissible wouldn't be reduced?

Tr. Vol. 56, 7313. The court is at a loss to understand how this question violated its earlier order regarding the API lawsuit. Defendant had previously introduced this study into evidence, and plaintiff's counsel was attempting to impugn its credibility by demonstrating that the study's conclusions were preordained by a financially motivated purpose. Although defendant vigorously disputes this suggestion, such an apprehension was a matter for the jury to make. Finally, and to repeat, the ques-

tions of counsel are not evidence. Whatever the nature of the poison perceived by defendant to have been injected with this question is deemed harmless by any reasonable standard.

G. Dismissal of Juror

Texaco contends that the court deprived it of a unanimous verdict under Fed. R. Civ. P. 48 by dismissing the foreperson of the jury, Mr. Pirner. After 6 days of deliberations, the jury informed the court that it had become "locked." The court delivered a modified *Allen* instruction the following day, ending with a suggestion that the jury continue in its efforts to reach a verdict. As the jury began to file out of the courtroom, Mr. Pirner delivered a note to the court, which was then disclosed to counsel in open court. Tr. Vol. 66, at 8640-44. The letter from Mr. Pirner was addressed to the court:

> Slightly over one year ago, I was rushed to Saint Joseph Hospital with a serious heart condition which was brought on by a great amount of stress caused by my job. I was in coronary care for a number of days and spent an additional amount of time in the hospital after release from coronary care.
>
> This is what brought on my early retirement.
>
> I had no idea at the outset that deliberation in this trial would be as stressful as it has been to me and I am concerned that it is going to cause a return to the condition I experienced in 1989.
>
> My blood pressure readings and other complications necessitated a visit to my doctor on Friday, January 12th 1990 and my doctor shares my concern. My doctors [sic] letter of recommendation is enclosed and I ask that you honor his request.

This letter was signed by Mr. Pirner. The letter from Mr. Pirner's doctor was addressed "To whom It May Concern" and stated:

> Larry Pirner was seen this day with acute nervous reaction, hypertension and acute insomnia. He should be released from jury duty at this time.

This letter was signed by Dr. R. Rex Lee, M.D., whom the court recognized as a reputable Wichita practitioner, and dated January 12, 1990. The court discussed the letters with counsel, after which the court decided that the only prudent course of action would be to discharge the juror for health reasons. Although defendant's counsel did not necessarily disagree with the court's decision, (Tr. Vol. 66, at 8642), defendant requested that the court inquire further and moved for a mistrial solely on the grounds of counsel's inchoate feeling that dismissing a juror in the midst of deliberations would deprive Texaco of a fair trial. Both motions were denied.

Federal district courts retain the discretion to remove a juror whose capacity to perform his or her duties has become impaired. *Green v. Zant*, 715 F.2d 551, 555 (11th Cir. 1983) (insufficient record based on foreperson's opinion of allegedly incapacitated juror and no medical advice was sought); *see also United States v. Wilburn* 549 F.2d 734, 739 (10th Cir. 1977); *Anderson v. Dun & Bradstreet, Inc.*, 543 F.2d 732, 734 (10th Cir. 1976). The dismissal of a juror must be justified by factual support or a legally relevant reason. *United States v. Dumas*, 658 F.2d 411, 413 (5th Cir. Unit A Oct. 1981), *cert. denied*, 455 U.S. 990 (1982). Included among the legally relevant reasons for dismissal is a nervous condition or fright. *United States v. Molinares Charris*, 822 F.2d 1213, 1222-23 (1st Cir. 1987) (nervous condition); *United States v. Franks*, 511 F.2d 25, 37 & n.19 (6th Cir.) (no abuse of discretion for trial court to dismiss juror complaining of "nerves," notwithstanding defendant's non-specific claim of prejudice), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Baca*, 494 F.2d 424, 427-29 (10th Cir. 1974) (fright). If the nature of the jurior's disability is evident, a hearing is unnecessary,

and the trial court need not permit counsel to make further specific inquiry. *Green*, 715 F.2d at 555; *Baca*, 494 F.2d at 428-29; *see also United States v. Hernandez-Garcia*, 901 F.2d 875, 878 (10th Cir. 1990) (trial court correctly refused request to *voir dire* juror who qualified response when polled). Finally, even if dismissal of a juror is shown to be error, a further showing of prejudice is required to constitute reversible error. *Anderson*, 543 F.2d at 735.

In support of its argument, defendant relies on *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987). In *Brown*, the court inquired of a juror who had sent a note to the court stating that he was unable to discharge his duties as a jury member. The court specifically ascertained that the juror's note had nothing to do with his health. *Id.* at 594. Instead, the juror indicated that he disagreed with the law applicable to the case, and also that he had difficulties with the evidence. The trial court dismissed this juror on the ground that his disagreement with the law prevented him from discharging his duties. On appeal, the court found that the defendants' Sixth Amendment right to a unanimous verdict had been violated, because the juror had also indicated doubts as to the sufficiency of the evidence. Under these circumstances, the court held that "if *the record evidence* discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Id.* at 596 (emphasis added).

It is unnecessary for this court to consider whether a civil defendant's right to a unanimous verdict under the Seventh Amendment compels application of the same "any possibility" standard announced in *Brown*. Even applying this criminal standard, the record discloses that the one and only reason underlying Mr. Pirner's request to be dismissed was a serious medical condition, as verified by the opinion of his physician. From this medical ail-

ment defendant attempts to construct a scenario that is "wholly consistent with Pirner being a holdout causing the jury to deadlock." Dkt. No. 494, at 70. The court believes that the only scenario these events are wholly consistent with is that Mr. Pirner, a man with a heart and nervous condition, had succumbed to the normal stresses of deliberation, as well as the added pressures of attempting to chair a group of nine individual, independent minds. In the court's view, it would have been unconscionable to subject Mr. Pirner to further deliberation at the risk of aggravating his existing precarious heart condition.

It is true that Mr. Pirner must have been one of the jurors causing a deadlock, insofar as he was one of the members of the jury. But it is impossible to divine from the record how this juror stood with respect to the evidence. It is equally "possible" that Mr. Pirner was persuaded by plaintiff's evidence, and that he was simply physically and emotionally unable to continue deliberating with a different "Texaco holdout" unsuspected by defendant. Defendant's theory is based on nothing more than a visceral hunch that Mr. Pirner was "for them," and that his dismissal resulted in the loss of a valuable defense ally.[22] Tr. Vol. 46, at 8661-62; *see Ellis v. Oklahoma*, 430 F.2d 1352, 1356 (10th Cir. 1970) (surmise and suspicion may not be used to assail integrity of jury), *cert. denied*, 401 U.S. 1010 (1971). But even as-

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[22] The court notes that another "possible" reason for defendant's conviction as to Mr. Pirner's sympathies may be found in an *ex parte* communication between Mr. Pirner and a lay person employed by defendant to sit as a "phantom juror" in the court gallery. Tr. Vol. 44, at 5157-77; *see Anderson*, 543 F.2d at 735 (upholding dismissal of juror who had a conversation with an employee of defendant). Of course, this mere possibility is as speculative as that now advanced by defendant, and it could no more form the basis of an allegation of error than defendant's present motion. As a result of this incident, this court has adopted the rule that the parties shall disclose the identity of observers in the courtroom and shall admonish such observers to refrain from communication with any juror.

suming the validity of this entirely speculative assumption, defendant's argument is premised on the notion that it has a constitutional right to at least one partisan on the jury, and that the unavoidable dismissal of its partisan solely for legitimate and necessary medical reasons deprived it of a hung jury. If this were the case, any losing party could always allege a Seventh Amendment violation from the dismissal of one of "their" jurors for medical or other legitimate reasons. Fortunately, a more earnest allegation of error is necessary before concerns of a constitutional magnitude are implicated. As the court held in *Anderson*, "[a] litigant has no vested right to keep a particular juror on the panel." 543 F.2d at 735.

Under Fed. R. Civ. P. 48, the parties may stipulate that a civil jury consist of less than 12 members, the only limitation on this being this district's local rule requiring at least 6 jury members. D. Kan. Rule 216. In this case, the parties had agreed to a unanimous verdict of all jurors able to continue in their jury service, and the court originally impanelled 10 jurors as a safeguard against the inevitable attrition to be expected during a trial of almost four months. During the course of trial, the court dismissed juror Skidmore for work reasons, which defendant does not challenge. After juror Pirner's dismissal for an even more compelling reason, eight members remained to continue deliberations. Thus, there is no merit to defendant's allegation that the dismissal of Mr. Pirner deprived Texaco of a unanimous verdict.

H. Punitive Damage Evidence

Defendant also alleges error in the court's exclusion of evidence offered by Texaco to negate or mitigate the punitive damage award.

First, the court did not permit defendant to introduce evidence of Texaco's withdrawal of other products from

the market, ostensibly out of safety concerns. Defendant contends that its actions at other times, concerning other products, is evidence of a company that places the public safety above its own economic concerns. Be that as it may, Texaco has been sued in this case only for its conduct with respect to the product benzene, and this conduct may not be established by using character evidence circumstantially for the purpose of proving action in conformity with that character on a particular occasion. Fed. R. Evid. 404(a). Moreover, even if Texaco's and Mr. Richards' general good character for acting in the public interest were admissible for this purpose, their character, which is not in issue in this case, could not be proven by specific instances of conduct. Fed. R. Evid. 405(b) (specific instances of conduct admissible only if character comprises an essential element of claim or defense). In upholding the exclusion of similar "good guy" evidence, the Kansas Supreme Court has poignantly observed: "A person who is ordinarily a philanthropist and humanitarian does not receive thereby a license to commit intentional wrongs on his days off." *Tetuan*, 241 Kan. at 484-85, 738 P.2d at 1240.

Second, defendant asserts that the court erroneously prevented it from introducing evidence of the amount of revenue generated by Texaco's benzene sales. Because benzene comprises only a small portion of Texaco's entire sales, defendant contends that this evidence would have provided the jury with a more appropriate measure by which to assess punitive damages. Under Kansas punitive damage standards, however, the amount of profit received as a result of intentional wrongdoing is not the ceiling of punitive damage liability. *Tetuan*, 241 Kan. at 491, 738 P.2d at 1245. To the contrary, if evidence of a defendant's financial status is introduced, the deterrent effect of punitive damages is served only by reference to the net wealth of the wrongdoer. Otherwise, a manufacturer could continue to "gamble" with low revenue,

"high risk" products, secure in the knowledge that any future punitive liability could always be mitigated by a compartmentalization of profits. *See id.*

I. Miscellaneous Rulings

Defendant also alleges error for compelling the attendance of Ron Richards, a Texaco employee, in plaintiff's case in chief, and for allowing a plaintiff to add a witness not listed in the pretrial order. Although Mr. Richards resides more than 100 miles from this district, he is Texaco for purposes of this lawsuit, and thus a party to the action. The court does not believe that the limitation of Fed. R. Civ. P. 45(e) applies to this situation, particularly considering defendant's stated intention to call this key witness in any event. The court discerns no error in this ruling. Nor can the court agree that it was error to allow plaintiff to call Dr. Infante after the court had allowed defendant to add several witnesses itself. The court also granted defendant's motion to call Mr. Kwon as a rebuttal witness of Infante's testimony, and allowed Mr. Kwon to testify on each specific factual area deemed deserving of a rebuttal. Order filed November 21, 1989. Defendant declined to act upon the court's grant of its motion. The court finds this allegation of error to be meritless.

V. *Jury Instructions*

A. Presumption of Causation

Defendant first argues that instructing the jury according to the presumption of causation from an inadequate warning was contrary to Kansas law.[23] As de-

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[23] Instruction No. 23 states:

If you find that Otis Mason's leukemia was caused by exposure to Texaco's benzene, you must also consider whether such exposure was caused, in whole or in part, by the nature of the warning given

fendant correctly notes, state law governs any presumptions in this diversity action. Fed. R. Evid. 302.

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by Texaco, or to the contrary, was caused by the acts of parties other than Texaco.

In considering whether Texaco's warning caused Otis Mason's exposure to benzene, you are instructed that a manufacturer may presume that an adequate warning will be read. Thus, if you find that Texaco's warning was adequate, you must find that Texaco did not cause Otis Mason's exposure to its benzene and accordingly, you must return a verdict for Texaco.

On the other hand, where the manufacturer's warning is inadequate, there is a presumption that this inadequate warning caused exposure to the manufacturer's product. Accordingly, if you find that Texaco's warning was inadequate, you may presume that this warning caused, either in whole or in part, Otis Mason's exposure to benzene.

The presumption that an inadequate warning caused exposure to a dangerous product may be overcome, or defeated, by evidence showing that the subsequent acts or omissions of parties other than the manufacturer were the sole cause of this exposure, rather than the manufacturer's inadequate warning, or may be overcome by any other evidence to the contrary. Thus, if you find that actions taken or not taken by parties in the chain of distribution or use of Texaco's benzene were the sole cause of Otis Mason's exposure to Texaco's benzene, then you must find that Texaco did not cause Otis Mason's exposure to its benzene.

In determining whether other parties were the sole cause of Otis Mason's exposure to Texaco's benzene, you are instructed as follows. A negligent act or omission by a party who acts after the first negligent actor is not the sole cause of an injury if the first negligent actor could foresee, or should have reasonably foreseen, the subsequent negligent acts or omissions by these other parties. Thus, if you find that Texaco's warning was inadequate, and that Texaco could foresee, or should have reasonably foreseen, the subsequent acts or omissions of other parties, then you must find that Texaco caused, either in whole or in part, Otis Mason's exposure to its benzene. On the other hand, if you find that Texaco's warning was inadequate, but that Texaco could not foresee, or should not have reasonably foreseen, the subsequent acts or omissions of other parties, then you must find that Texaco did not cause Otis Mason's exposure to its benzene.

In *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965 (1984), the court held:

> There is a presumption that an adequate warning would be heeded. This operates to the benefit of a manufacturer where adequate warnings are in fact given. Where warnings are inadequate, however, the presumption is in essence a presumption of causation.

Wooderson, at syl. ¶ 11 & 410, 681 P.2d at 1057; *see also Long v. Deere & Co.*, 238 Kan. 766, 778, 715 P.2d 1023, 1032-33 (1986) (manufacturer failed to defeat presumption notwithstanding contrary evidence on causation). Defendant neither cites nor responds to these cases, but instead raises two arguments to defeat application of the presumption to this case.

Defendant first contends that this presumption, if it exists at all, has no application to bulk sellers whose warning never reaches the ultimate consumer. Under the prescription drug rule adopted in *Wooderson*, however, the court was also confronted with a factual situation in which the warning was not intended for the ultimate consumer of the product. Thus, the facts of the very case adopting the presumption of causation in Kansas refute this argument.

Defendant's main argument focuses on a statutory construction that the court assumes is an invitation to "correct" the Kansas Supreme Court's decisions in *Wooderson* and *Long*. Specifically, defendant relies upon K.S.A. § 60-414, which provides in full:

> Subject to K.S.A. 60-416 [inconsistent presumptions], and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise,
>
> (a) if the facts from which the presumption is derived have *any* probative value as evidence of the

> existence of the presumed fact, the presumption continues to exist and the burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption operates;
>
> (b) if the facts from which the presumption arises have *no* probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

(emphases supplied). Defendant only cites to subsection (b) of this statute, arguing that any presumption of causation disappears if "evidence is introduced which would support a finding of the nonexistence of the presumed fact . . . ." Defendant contends that it introduced such evidence through certain Coast Guard employees who testified as to what they would have done if they had received Texaco's MSDS or other information comparable to that in Texaco's MSDS.

This court must assume that the Kansas Supreme Court is familiar with Kansas statutory law, and that it does not fashion its holdings in derogation to the intent of the Kansas elected branches. Fortuitously, the court need not accept defendant's implicit invitation to reconsider the *Wooderson* decision for the Kansas Supreme Court, because it finds defendant's argument to be based upon the erroneous assumption that this presumption comes within subsection (b) of the statute. Under subsection (a), a presumption derived from evidence that itself has any probative value is not eliminated simply because some evidence contrary to the presumed fact is introduced. Kansas as well as federal law provides that evidence having any tendency in reason to establish a material fact has probative value. *Schmeck v. City of*

Shawnee, 232 Kan. 11, 32, 651 P.2d 585 (1982); *State ex rel. Hausner v. Blackman*, 7 Kan. App. 2d 693, 698, 648 P.2d 249 (1982), *aff'd*, 233 Kan. 223, 662 P.2d 1183 (1983); Fed. R. Evid. 401 & advisory committee's note. Thus, the court must conclude that the presumption of causation falls under subsection (a) of the statute if evidence of an inadequate warning has any tendency to render the inference of causation "more probable than it would be without the evidence . . . ." *Blackman*, 7 Kan. App. 2d at 698.

The court finds that evidence of an inadequate warning easily meets the liberal test for probative value under the Kansas and federal rules. It must be borne in mind that evidence need not *establish* a fact, by any standard of proof, for it to have probative value. All that is required is that it have *any* tendency to make the existence of the fact more probable than it would be without the evidence. Fed. R. Evid. 401. And the clear language of K.S.A. § 60-414(a) directs that presumptions created by evidence having *any* probative value in establishing the presumed fact continue to exist notwithstanding the introduction of "some" contrary evidence. The facts of this case have a particularly compelling tendency to support an inference of causation from an inadequate warning, because each entity within the chain of distribution or use altered its conduct when it finally learned of benzene's carcinogenic propensities. Thus, the court concludes that instructing according to the presumption of causation from an adequate warning is a correct statement of Kansas law under both *Wooderson* and K.S.A. § 60-414(a).

B. When the Duty to Warn Arises

Instruction No. 10 stated in relevant part:

> There is no duty to warn of every remote possibility of danger that could result from the use of a chemical product such as benzene. The labeling, writ-

> ten information, and/or any other method of communicating the warning should include a warning as soon as there is reasonable evidence of an *association* of a serious hazard with the product. The manufacturer must warn of those dangers which are reasonably foreseeable. Although a conclusive *causal* relationship need not have been proven, where scientific or medical evidence exists tending to show that a certain danger is *associated* with use of the chemical, the manufacturer may not ignore or discount such information in making its warning solely because it finds it to be unconvincing.

(emphases supplied). Defendant challenges this instruction on the ground that the court erred in determining when the duty to warn arises. Defendant's expert Dr. Labarthe testified that the word "association" has a very specific meaning in epidemiology, and that an association between a given compound and a disease does not necessarily establish a cause and effect relationship. Thus, by not inserting the words "causal" and "causally" before the words "association" and "associated," respectively, defendant claims that the court's instruction is inconsistent with the testimony of Dr. Labarthe.

With respect to when the duty to warn arises, the Kansas Supreme Court held in *Wooderson*:

> "[W]here scientific or medical evidence exists *tending to show* that a certain danger is *associated* with use of the drug, the manufacturer may not ignore or discount that information in drafting its warning *solely because it finds it to be unconvincing.*

235 Kan. at 417, 681 P.2d at 1062 (quoting *Seley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 198, 423 N.E.2d 831 (1981)) (emphases added by Kansas Supreme Court). The *Wooderson* court also reemphasizes this holding in the court syllabus. *Id.* at syl. ¶ 10. To the extent there is any error to correct on this matter, the court believes

that defendant's argument is addressed to the wrong forum. In Kansas, Texaco's duty to warn is defined by the pronouncements of the Kansas Supreme Court, and not by the hypertechnical, nuanced distinctions made by scientists who testify in lawsuits.

Assuming for the moment that it is improper to instruct according to Kansas law, two considerations mitigate the asserted error of the court's refusal to modify the words "association" and "associated" with defendant's preferred adjective and adverb. First, "it is well settled that the form of jury instructions is a matter for the trial court's discretion, and the trial court need not give an instruction in the exact form and language requested." *United States v. Gomez-Olivas*, 897 F.2d 500, 502 (10th Cir. 1990). If the court's instruction "as a whole adequately states the law, the refusal to give a particular requested instruction is not an abuse of discretion." *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990). The language of Instruction No. 10 makes clear that the relationship triggering the duty to warn is the technical *causal* association. Second, it taxes the imagination to believe that during a three month trial generating volumes of testimony on numerous issues, non-scientific minds such as those of a lay jury could possibly assimilate the various hues of the word "association" recognized by epidemiologists. The court is convinced that no danger of confusion existed by instructing according to the language of *Wooderson*.

C. Manufacturer's Duty as an Expert

Defendant also takes issue with the standard of knowledge imposed upon the manufacturer under Instruction No. 10, which in relevant part informed the jury that "the manufacturer is deemed to have the knowledge of an expert in that field." Defendant complains that imputing such extraordinary knowledge to Texaco is inconsistent with the standard of a reasonable manufacturer under Kansas law.

Defendant fails to appreciate that as a matter of law, all reasonable manufacturers are deemed to have the knowledge of experts in their particular field. *Wooderson*, 235 Kan. at 409, 681 P.2d at 1057 & syl. ¶ 6; *see also Garst v. General Motors Corp.*, 207 Kan. 2, 21, 484 P.2d 47, 61 (1971) (several factors relevant in determining whether manufacturer has in fact exercised the care and skill of an expert). This "extraordinary" knowledge imputed to manufacturers is entirely consistent with the policies of strict liability recognized in Kansas.[24] *Davis v. Fox River Tractor Co.*, 518 F.2d 481,

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[24] Defendant has also argued that Kansas no longer recognizes strict liability for failure to warn cases. In support, defendant calls attention to Kansas Supreme Court language emphasizing the standard of "reasonableness" under either negligence or strict liability. *See Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 661 P.2d 348, syl. ¶ 6. (1983); *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 286, 718 P.2d 1318 (1986) (plaintiff must show negligence on the part of the manufacturer in determining warning issues). By emphasizing the "reasonableness" or "negligence" of the manufacturer, however, the *Johnson* decision does no more than reaffirm that Kansas strict liability law is thoroughly infused with negligence concepts. *See Kennedy v. City of Sawyer*, 228 Kan. 439, 448-52, 619 P.2d 788 (1980) (comparative negligence principles are applicable to Kansas strict liability actions); *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 373, 634 P.2d 1127 (1981) ("strict liability in tort does have a fault basis, therefore subjecting it to comparison with other fault concepts"); *Wooderson*, 235 Kan. at 403-04, 681 P.2d at 1052 ("product which is faultlessly designed and manufactured may be nevertheless unreasonably dangerous within the meaning of § 402A if not accompanied by proper warnings" and "[a]s a practical matter, this in determined by application of negligence theory") (quoting *Ortho Pharmaceutical v. Chapman*, 180 Ind. App. 33, 50-52, 388 N.E.2d 541 (1979)). Whatever conceptual difficulties may attend this approach, the Tenth Circuit has likewise recognized that the adequacy of a warning in Kansas is " 'judged under a reasonableness standard—even if the claim is made under the rubric of a strict products liability defect.' " *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1411 (10th Cir. 1988) (quoting *Johnson v. American Cyanamid Co.*, 718 P.2d at 1324-25 (1986)); *see also Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 455 (10th Cir. 1982). Thus, there is no basis for the inference that

484 n.4 (10th Cir. 1975) (§ 402A of the *Restatement (Second)* imposes a higher standard of conduct upon manufacturers than does common law negligence). Defendant's objection to this language is meritless.

D. Punitive Damages

Defendant challenges the court's denial of its request for an instruction that punitive damages may be imposed only for conduct tantamount to fraud. In essence, defendant argues that because fraudulent conduct is sufficient to impose punitive damages under Kansas law, such conduct is also necessary.

The Kansas Supreme Court has consistently held that punitive damages may be awarded "whenever the elements of fraud, malice, gross negligence, *or* oppression mingle in the controversy." *Wooderson*, 235 Kan. 387, 681 P.2d 1038, syl. ¶ 16 (emphasis supplied). Such damages are awarded as punishment for the "malicious, vindictive, *or* willful and wanton invasion of another's rights . . . ." *Tetuan*, 241 Kan. at 481, 738 P.2d at 1239 (emphasis supplied). Either willful or wanton conduct is sufficient to impose punitive damages, and no element of intentional wrongdoing is required for conduct to be "wanton." *Folks v. Kansas Power & Light Co.*, 243 Kan. 57, 72-75, 755 P.2d 1319, 1333-34 (1988). As affirmed by the Kansas Supreme Court in *Wooderson*, facts supporting an inference of gross negligence or reckless indifference to the rights of others are sufficient to submit the issue of punitive damages to the jury. 235 Kan. at 419, 681 P.2d at 1064. Defendant's reliance on those Kansas cases imposing punitive damages for fraudulent

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Kansas has abandoned the cause of action of strict liability or its underlying policies as applied to claims of failure to warn. *But see Graham v. Wyeth Laboratories*, 666 F. Supp. 1483, 1499 (D. Kan. 1987) (per Judge Kelly), *rev'd on other grounds*, —— F.2d —— (10th Cir. June 25, 1990).

conduct is misplaced. To engraft this element of proof on all punitive damage claims would require the court to disregard as mere surplusage the numerous pronouncements by the Kansas Supreme Court on this subject.

Defendant also alleges error in the court's instructions regarding the burden of proof under which punitive damages may be awarded. Defendant asserts that Kansas law requires punitive liability to be proven by clear and convincing evidence, citing to *Mackey v. Burke*, 751 F.2d 322 (10th Cir. 1984).

Although defendant has previously argued that Kansas requires proof of fraud before the jury can award punitive damages, the present objection is apparently being raised for the first time. Indeed, interrogatory number 7 of defendant's proposed verdict form requests a preponderance of the evidence standard for punitive liability. Dkt. No. 456. Assuming defendant had raised a timely objection to the court's instructions on this matter, the argument would fail on the merits. It comes as no surprise that the *Mackey* court reviewed the jury's award of punitive damages under a clear and convincing standard, because the punitive award in that breach of contract action was predicated on proof of intentionally deceptive or fraudulent activity. 751 F.2d at 328. As already noted, the Kansas Supreme Court has never required proof of fraud to justify an award of punitive damages for tortious conduct. In addition, the Kansas Supreme Court has not interpreted any of its decisions to have created a new burden of proof for punitive damages. In *Folks* the court took note of recent requests to legislatures and *courts* "to change the standards for awarding punitive damages," including the requirement of "a higher standard of proof, *i.e.*, clear and convincing." 243 Kan. at 72, 755 P.2d at 1332. Apparently, the *Folks* court considered it a given that as of 1988, the clear and convincing standard for punitive damages was nothing more than a proposal and awaited further legislative or

court action.[25] Instructing the jury under the traditional preponderance of the evidence standard accurately stated Kansas law.

E. Liability of Gerin

Defendant requested that the jury be specifically instructed to consider as an additional basis of fault Gerin's "affirmative representation" of compliance with ASTM 96.[26] *See supra* section III.C. This instruction appears to be the type of detailed "evidentiary instruction" that defendant elsewhere vigorously opposed. Nevertheless, the evidence of Gerin's alleged misrepresentation was before the jury, and its relevance to Gerin's proportionate fault was a matter appropriate for emphasis by counsel, not the court. *See Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 201-02 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 99, 101 (N.D. Ill. 1982). Moreover, the instruction as requested assumes liability regardless of any actual or constructive knowledge on the

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[25] The court notes that the Kansas legislature has since responded by changing the burden of proof for punitive damages to the clear and convincing standard. Kan. Stat. Ann. §§ 60-3701(c), 60-3702(c) (Supp. 1989). By the express terms of the statute, this change is effective only as to actions accruing on or after July 1, 1987. *Id.* at §§ 60-3701(i) & 60-3702(h).

[26] Defendant's Proposed Instruction No. 25 read:

> Evidence has been introduced that Gerin was selling benzene as a component of its oil water and sediment test. Evidence has also been admitted that the use of benzene as a solvent in this test was not in compliance with the standard test, ASTM96. The evidence further shows that at all times relevant to this lawsuit, Gerin affirmatively represented that the Gerin test kit complies with ASTM96. If, from the evidence, you find that the Coast Guard relied upon this representation, and as a result of that reliance Otis Mason contracted leukemia, you may consider this as an additional basis upon which you can find Gerin at fault.

(citing *Restatement (Second) of Torts* § 402B).

part of Gerin regarding benzene's carcinogenic properties, and would therefore have allowed the jury to find fault without reference to Gerin's legal duty. The court finds no error in refusing this instruction.

F. *Allen* Instruction

Defendant also objects to giving an *Allen* instruction.[27] On the sixth day of deliberations, the jury sent a note to the court stating: "The jury has become locked on ques-

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[27] The instruction read:

> It is apparent that after some 6 days of deliberation on this case, there must be some problem among the jury about agreement on the issues outlined in Instruction No. 6, which you are to follow.
>
> You know from hearing the evidence that it is an old case—some 10 years since Otis Mason died and over 11 years since the case was filed. You also know there were prior proceedings that occurred some years ago. If you cannot decide this case, there will undoubtedly be a future trial before another judge and jury. Justice is thwarted by delay. You as jurors and I as judge have a duty under our oaths to these litigants and to the public to get this case decided by you—if at all possible.
>
> The underlying reason for the jury system of fact finding—in accordance with the judge's instructions on the law of the case—is to see that a fair trial occurs, that truth is found, and that justice is done on the evidence. Now, you as jurors, and I as judge, are the bearers of this responsibility. Allow me again to emphasize your duties as jurors as set forth in several instructions.
>
> If you were sitting as jurors in a criminal trial, the government as plaintiff would have the burden of proof to persuade you of a defendant's guilt by producing evidence demonstrating such guilt beyond a reasonable doubt. Since nothing can be proved to absolute certainty, the government in a criminal case would have to produce evidence upon which no juror would hesitate to act upon in the most serious of his or her own affairs, i.e., matters concerning life and death, harm to a family member, or a grave financial decision. This "beyond a reasonable doubt" standard is the highest burden of proof in jury cases.
>
> The next highest burden of proof occurs in civil jury cases where fraud is alleged against a defendant. In cases involving

tion #2. We await your instruction." The court replied with a note of its own, asking "that the jury specify what [was] meant by the word 'locked,'" and also in-

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allegations of fraud, the law requires a plaintiff to prove his or her case by clear and convincing evidence. The clear and convincing evidence standard means that the evidence should be "clear" in the sense that it is certain, plain to the understanding, unambiguous, and "convincing" in the sense that it is so reasonable and persuasive as to cause the jury to believe it.

Finally, the third and lowest burden of proof upon a party is by a preponderance of the evidence, as explained in Instruction No. 4. A preponderance of the evidence simply means more probably true than not true, or, as it is often stated, more likely so than not so. This is the only burden of proof in this case, and, unless otherwise stated in the instructions, the burden is on the plaintiff on all issues except on the issue of the comparative fault of other actors, in which case the burden is on the defendant. I emphasize that this burden is satisfied only by facts shown in evidence. Facts are not produced by the questions or statements of lawyers, but by testimony or written exhibits. The jury may reach an inference of a true fact from other facts which have been shown to be likely true—aided by a juror's common sense. However, as emphasized in Instruction No. 47, a juror's own personal experience cannot be substituted for common sense (common experience to mankind in general). Neither can a juror make a finding of fact based on his or her own subjective opinion or feeling. There must be probative evidence to support a finding of fact. No juror in a civil case is given license to decide the case based on *her or her own feeling* without basing it on evidence *in the record*.

Prejudice or bias on the basis of a juror's personal experiences or subjective belief is NOT permitted. Every prospective juror was asked by the Court during the selection process whether he or she had that open and unprejudiced state of mind that he or she would want a juror to have if he or she were a party litigant in the case. Every one of you assured me and the lawyers on each side that you could be fair and unprejudiced toward either party. I hold you to this. If any among you are not judging the case on the evidence, you cannot be a fair juror.

From my observation, the issues in this case can be decided on a preponderance of the evidence without difficulty by each juror concentrating on the evidence, weighing it, and judging

structing the jury to specify any clarification of the evidence it might be requesting.[28] In turn, the jury responded: "the word 'locked' was used in lieu of hung jury. Several members of the jury wishes [sic] to ask: 'why does question number 2 have to be 100% yes or no when question number 8 has a place for a percentage

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> the believability of the witnesses under the rules previously given you for judging credibility. Please concentrate on Instructions Nos. 48 and 49. I do not desire that any juror should surrender his or her conscientiously held convictions based on evidence in the record. On the other hand, each juror should perform his or her duty conscientiously and honestly, according to the law and the evidence, and although the verdict to which a juror agrees must, of course, be his or her own verdict, the result of his or her own convictions in weighing the evidence, and not a mere acquiescence in the conclusions of his or her fellows, yet in order to bring your nine minds to a unanimous result you must examine the question submitted to you with candor and with a proper regard and deference to the opinion of each other.
>
> I'm of the opinion that this case cannot be tried better or more exhaustively than it has been on either side. You should consider that the case must at some time be decided, that you are selected in the same manner and from the same source from which any future jury would be selected, and there is no reason to suppose that the case will ever be submitted to a jury of men and women more intelligent, impartial, or competent than yourselves, or that clearer evidence will be produced by one side or the other. Please try very hard to reach a verdict. It can and, if at all possible, should be done. Although the decision ultimately rests with you, the jury, I suggest that you now retire again and continue to consider the evidence under the instructions the Court has provided.

(emphasis in original).

[28] Defendant also objected to the court asking the jury to clarify its first note without first consulting counsel. The court overruled this objection to an administrative direction from the court. *See Acree v. Minolta Corp.*, 748 F.2d 1382, 1384-86 & n.2 (10th Cir. 1984); *see also United States v. Wilburn*, 549 F.2d 734, 737-38 (10th Cir. 1977) (harmless error under criminal rules to instruct deadlocked jury to continue deliberations without informing counsel).

of blame.' " [29] At this point the court decided to give an *Allen* instruction and to respond to the jury's question. Defendant's counsel objected to any attempt at all to encourage further deliberation and specifically objected to the language in the supplemental instruction contrasting the burdens of proof for different types of cases. Defendant raises this same objection in the present motion and also asserts that the instruction was coercive and clearly communicated the court's leanings to the jury.

The court's scrutiny of the supplemental instruction has failed to discover the language alleged to have "driven" the jury to render a "record setting verdict" in this case. Nor did the jury, which deliberated for another week, apparently consider this an exhortation to march back out and promptly return a verdict for the plaintiff. The bulk of the instruction reminds the jury of its various duties already set forth in other instructions. Although defendant contends that the instruction minimized plaintiff's burden of proof, this language only re-

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[29] Interrogatory No. 2 asked the jury: "Do you find by a preponderance of the evidence that the benzene produced by Texaco was a cause of Mason's leukemia?" Interrogatory No. 8 instructed the jury to apportion the fault among the various persons or parties. The court's response to this question read:

> In response, the Court informs the jury that question #2 on the verdict form addresses the initial issue of causation from benzene manufactured by Texaco. Under this question you must determine whether Otis Mason was exposed to benzene manufactured by Texaco, and if exposed, whether such exposure was a substantial factor in causing his leukemia. Even if you should answer question #2 in the affirmative, however, this does not answer the question of whether Texaco was at fault for causing such exposure. Nor does an affirmative answer to question #2 answer whether and by what percentage other parties may be at fault for Otis Mason's leukemia. Question #8 addresses the issue of the comparative fault of other parties. Under this question, you must determine the relative fault, if any, of the various parties listed in Instruction No. 31. As explained in the instructions, fault cannot exist without first establishing causation of injury.

states what the jury had already been told. Moreover, the Tenth Circuit has specifically rejected the argument that an *Allen* instruction in a civil case is rendered coercive when the court simply reminds the jury of its task under the preponderance of the evidence standard, rather than the higher burden of beyond a reasonable doubt. *Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951, 978 (10th Cir. 1990) (*Allen* instruction delivered on fourteenth day of deliberations), *cert. denied*, 58 U.S.L.W. 3812 (U.S. June 26, 1990). Contrary to the argument now raised by defendant, the court's statement that the issues in this case could be decided by a preponderance of the evdence is facially nuetral; it expresses no opinion one way or the other as to *how* the evidence should preponderate. It might just as easily be said that the language "prujudices" plaintiff by re-emphasizing that the burden on most issues is upon plaintiff. The instruction also makes clear that no juror is to give up any conscientiously held convictions and leaves open the possibilty of a hung jury. *See United States v. Dyba*, 554 F.2d 417, 420-21 (10th Cir.), *cert. denied*, 434 U.S. 830 (1977); *United States v. Hernandez-Garcia*, 901 F.2d 875, 876-77 (10th Cir. 1990) (no plain error to tell jury that case would have to be decided by another jury, rather than leaving open possibility of settlement).

Overall, defendant's objection to the instruction appears to be based primarily on a *res ipsa loquitur* approach to allegations of prejudicial error: the jury found against defendant, therefore error must have occurred. The court believes that something more should be required than a general objection to *any* attempt to encourage further deliberation. This is particularly true in light of the jury's query regarding the difference between Interrogatories Nos. 2 and 8, which indicated that the jury was still struggling with the issues and had already begun to deliberate anew. *See United States v. Porter*, 881 F.2d 878, 889 (10th Cir.) (where indication that jury was not

hopelessly deadlocked, *Allen* instruction emphasizing importance of reaching a verdict not coercive), *cert. denied*, 110 S. Ct. 348 (1989). In a case of this length, and in the second trial of an already protracted lawsuit, the court would consider it an abdication of its judicial duty to declare a mistrial unreservedly without at least some suggestion that the jury reconsider its deadlock. *See United States v. Winn*, 411 F.2d 415, 416 (10th Cir.) (distinguishing between coerciveness and judge's "common law right and duty to guide and assist the jury toward a fair and impartial verdict"), *cert. denied*, 396 U.S. 919 (1969). As the court stated in *United States v. Smith*, 857 F.2d 682 (10th Cir. 1988):

> The purpose of [an *Allen*] charge is to encourage unanimity (without infringement upon the conscientious views of each individual juror) by urging each juror to review and reconsider the evidence in the light of the views expressed by other jurors, in a manner evincing a conscientious search for truth rather than a dogged determination to have one's own way in the outcome of the deliberative process. In short, the substance of the *Allen* charge is the salutary admonition of Oliver Cromwell. "I beseech you in the bowles [bowels] of Christ, think it possible you may be mistaken."

857 F.2d at 683-84. In the court's view, its instruction did no more than fulfill this laudable purpose.

VI. *Misconduct*

Defendant also alleges several instances of misconduct both on the part of the court and plaintiff's counsel that prejudiced its case.

Defendant contends that the court "audibly" commented on the credibility of the defendant's witness during bench conferences. Throughout the trial, the side bar "huddles" took place not at the bench, but at the end of the bench

on the opposite side of the courtroom from the jury. Between the approximately 50 feet separating this end of the bench from the jury box stands the elevated section of the court clerk's station, which further dampens any sound that might escape side bar conferences.

This description of the topographical conditions of the courtroom places defendant's current allegations in the proper perspective. Undoubtedly, an alert and curious juror may have been able to seize upon the occasional word, although the court cannot imagine why the jury would not welcome these brief, merciful respites from the often tedious testimony by discussing more mundane matters among themselves. And it is equally true that at times all persons at side bar, including defendant's counsel, may have spoken louder than intended. *E.g.*, Tr. Vol. 11, at 987; Tr. Vol. 46, at 5410. The court often admonished the parties to lower their voices, and when necessary the jury was dismissed to allow for further uninhibited argument. As to the single instance of allegedly audible comment by the court, the record is devoid of any indication whether fans were running at the time of this side bar conference, which would render almost infinitesimal the likelihood of the jury having heard anything. Moreover, the cited instance is unaccompanied by any contemporaneous request or objection in the record. The court is likewise unable to discern from the affidavit of Mr. Wiechmann, counsel for defendant, what he heard and when by sitting in the back of the courtroom. Because Mr. Wiechmann normally sat at the defense table, a suspicious mind might infer that the purpose of those occasions on which he sat in the court gallery was to create a record, rather than to assist the court in taking any necessary corrective action. Indeed, if his problem had been of such genuine concern to counsel during the trial, it is reasonable to assume that defendant would have proposed an alternative method of conducting side bar conferences, such as retiring to chambers or even

dismissing the jury. Defendant's counsel are familiar practitioners in this court and are surely aware that this court is easily approachable and always open to suggestion on such matters. In conclusion, the court finds that defendant's allegation of error is based on sheer speculation. It is therefore unnecessary to consider what harmful effect this might have had on the substantial rights of defendant. Fed. R. Civ. P. 61. *See Kloepfer*, 898 F.2d at 1461 (no reversible error for allegation that counsel raised his voice within jury's earshot during sensitive discussion); *United States v. Mobile*, 881 F.2d 866, 877 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 837 (1990).

Defendant calls attention to several statements made by plaintiff's counsel during closing argument said to constitute prejudicial misconduct. Trial misconduct must be particularly egregious to require retrial, and the trial court retains broad discretion in making this determination. *Polson v. Davis*, 895 F.2d 705, 711 (10th Cir. 1990); *Kloepfer*, 898 F.2d at 1461. Although an argument may be improper, "the judgment should not be disturbed unless it clearly appears that the remarks in question unduly aroused the sympathy of the jury and thereby influenced the verdict." *Texas Eastern Transmission v. Marine Office*, 579 F.2d 561, 567 (10th Cir. 1978); *see also Smith v. Atlantic Richfield Co.*, 814 F.2d 1481, 1488 (10th Cir. 1987).

While holding up a life expectancy chart, plaintiff's counsel briefly suggested that Otis Mason's projected life expectancy could relate to the jury's assessment of a monetary value for pain and suffering. Because compensation for pain and suffering obviously presupposes that the person was alive and thus able to experience pain, the court in unable to perceive how this single non sequitur could have influenced the jury's award for this item. Plaintiff's counsel also suggested that the jury could valuate Otis Mason's pain and suffering by reference to Texaco's profits during the period of his illness. The court

agrees with defendant and concludes that an accurate reading of Kansas law does not allow a defendant's financial condition to enter into the jury's consideration of compensatory damages for items such as pain and suffering. *See Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). As already noted, however, the court instructed the jury that the only purpose for which it could consider defendant's financial worth was in assessing punitive damages. *See supra*, section IV.A. Further, the jury was specifically instructed to disregard anything said by counsel at variance with the court's instructions. Instruction No. 49. Thus, considering this comment within the entire context of the trial and closing argument, it does not clearly appear that this could have possibly prejudiced defendant.

Finally, defendant alleges an instance of improper argument for counsel's statement that Texaco caused Otis Mason to die, and "that other people were and still are dying . . . . because Texaco doesn't tell the people they sell it to so they can pass it on to you . . . ." Tr. Vol. 62, at 8499. The argument of counsel was an entirely permissible inference from the evidence, and the court finds no error in this statement. Taken as a whole, the statements of counsel during closing argument are more appropriately characterized as zealous advocacy rather than prejudicial conduct. *Squyres v. Hilliary*, 599 F.2d 918, 923 (10th Cir. 1979).

VII. *Damages*

Finally, defendant challenges as excessive both the actual and punitive damages awarded. Additionally, defendant asserts that the jury's punitive award violates the due process clause of the Fourteenth Amendment.

A. Compensatory Damages

The actual damages in this case were awarded under plaintiff's survival action and wrongful death claim. The Kansas survival action allows recovery of damages for

the pain, suffering, disability and any accompanying mental anguish suffered by the decedent before death, as well as for reasonable medical expenses provided both professionally and gratuitously by relatives. *See, e.g., St. Clair v. Denny*, 245 Kan. 414, 421, 781 P.2d 1043 (1989). Under plaintiff's wrongful death claim, damages were awarded for the survivors' bereavement and mental anguish, loss of services, attention, marital and parental care and protection, and for loss of future earnings. As with all of its functions as trier of fact, the jury has wide discretion in determining the amount of damages that will fairly compensate the aggrieved party. *Black v. Hieb's Enterprises, Inc.*, 805 F.2d 360, 362-63 (10th Cir. 1986); *see also Menne v. Celotex Corp.*, 861 F.2d 1453, 1474 (10th Cir. 1988) (plaintiff is not bound by the amount of relief requested in the complaint but only by the evidence adduced at trial). The court reviews the amount of damages awarded by the jury under the standards set forth in *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152 (10th Cir. 1981) (en banc) (plurality opinion), *cert. denied*, 464 U.S. 824 (1983):

> [A]bsent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate. Such bias, prejudice or passion can be inferred from excessiveness. However, a verdict will not be set aside on this basis unless it is so plainly excessive as to suggest that it was the product of such passion or prejudice on the part of the jury.

Id. at 1168 (citations and footnote omitted).

The court has reviewed the jury's award of $4,000,000 for Otis Mason's personal injuries and $5,025,000 for plaintiff's wrongful death claim and finds

these to be reasonable amounts, supported by the evidence and uninfluenced by either passion or prejudice. Although defendant attempts to minimize the degree of physical and mental pain and suffering experienced by Mason, the court finds this argument to be unconvincing. After the initial diagnosis, which itself involved a number of painful bone marrow tests, Mason began a series of excruciating chemotherapy treatments. These treatments successfullyy induced a period of remission, during which time Mason nonetheless experienced internal bleeding and was required to undergo continuous maintenance treatment. Mason was also aware that the period of remission would be only temporary, and that his only hope for survival was that a cure would be found in time. Once out of remission, Mason again underwent chemotherapy and was aware that he would die. Both Mason and his wife also saw a psychiatrist at this time to help them with the mental anguish caused by his considerable suffering and impending death.

Bearing in mind that much of the jury's compensatory award is based on intangible items such as pain and suffering, the court will not disturb the jury's findings on this issue. *See Fudge v. City of Kansas City*, 239 Kan. 369, 380, 720 P.2d 1093 (1986). The court's conclusion is further strengthened by the fact that this is the second time a jury has determined actual damages in the amount of some $9,000,000. Even if the court were to disagree with this jury's assessment, the court would hesitate to disturb a finding that two juries, deliberating independently, have now made.

B. Punitive Damages

Defendant challenges any award of punitive damages as unwarranted under the evidence. Alternatively, defendant contends that the amount awarded is the result of passion and prejudice, and is violative of the Fourteenth Amendment's due process clause.

In a diversity action, the court must consider the propriety of a punitive damage award with reference to those factors under which state law deems such an award appropriate. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1448 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988). However, whether to order a new trial or grant a remittitur based upon an insufficiency of evidence or excessive damages is a procedural matter governed by federal law. *Id.*; *England v. Gulf Western Mfg. Co.*, 728 F.2d 1026, 1029 (8th Cir. 1984). Where the only error is in the excessiveness of an award that itself is not the result of passion or prejudice, the court may order a remittitur. *Malandris*, 703 F.2d at 1168; *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1162 (10th Cir. 1985). The decision of whether to grant a remittitur rests within the broad discretion of the trial court. *Garrick v. City and County of Denver*, 652 F.2d 969, 971 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983). *Malandris*, 703 F.2d at 1184 n.1 (Seymour, J., concurring and dissenting).

The court is also mindful that under Kansas law, "[w]hether to award punitive damages and in what amount is for the jury to determine." *Folks v. Kansas Power & Light Co.*, 243 Kan. 57, 76, 755 P.2d 1319, 1335 (1988). The standards governing punitive damages in Kansas are set forth in *Tetuan v. A.H. Robbins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987):

> Punitive damages may be awarded whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy. Punitive damages are awarded to punish the wrongdoer for his malicious, vindictive, or willful and wanton invasion of another's rights, with the ultimate purpose being to "restrain and deter others from the commission of like wrongs."

241 Kan. at 481, 738 P.2d at 1239 (citations omitted).

In this case, there can be no doubt that Texaco was actually aware of the substantial body of scientific literature indicating the carcinogenic danger of benzene. Ron Richards, the epidemiologist responsible for drafting Texaco's warnings, candidly admitted that he had read and was aware of many of these studies and reports. This fact alone was sufficient to create a jury question whether Texaco had acted wilfully, wantonly, or with gross negligence by failing to warn of the danger. In defense of Texaco's decision not to include this danger in its warning, Mr. Richards also adopted inherently inconsistent positions. On the one hand, Mr. Richards repeatedly stated his belief that the scientific studies did not indicate the carcinogenic danger of benzene "to a reasonable degree of certainty." On the other hand, this witness testified that Texaco chose the language "damage to blood forming organs" because this more comprehensive term was superior to the language "cancer hazard." In other words, Texaco did not believe that the literature indicated a reasonably certain association between benzene exposure and leukemia, yet Texaco chose the language "damage to blood forming organs" because this "more accurate term" included other blood diseases besides leukemia. From these factually irreconcilable positions the court believes the jury could reasonably infer that Texaco's warning was designed to conceal, rather than inform of the carcinogenic danger posed by its product.

Defendant attempts to defeat the jury's finding of punitive liability by contrasting the facts of this case with those of two recent Kansas cases. In *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987), direct documentary evidence established a course of deceptive conduct intended to mislead the users of the manufacturer's product. With this argument defendant implies that willful, wanton, or malicious conduct may only be established when, as in the case of the A.H. Robins Company, the manufacturer obligingly leaves a paper trail documenting its misdeeds. The court does not believe

that a manufacturer's punitive liability may only be based on a resolution adopted by its board of directors any more than the law requires direct evidence to establish the state of mind of criminal defendants. To the contrary, Kansas law allows for punitive damages if the evidence shows "that the actor *must be deemed* to have realized the imminence of injury to others from his acts and to have refrained from taking steps to prevent the injury because indifferent to whether it occurred or not." *Folks*, 243 Kan. at 72, 755 P.2d at 1332 (quoting *Cope v. Kansas Power & Light Co.*, 192 Kan. 755, 761, 391 P.2d 107 (1964)) (quoting *Frazier v. Cities Serv. Oil Co.*, 159 Kan. 655, 157 P.2d 822 (1945) (emphasis added by *Folks* court).

Defendant also attempts to distinguish this case from the facts of *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965 (1984), in which the manufacturer played down reports that it did not consider convincing until it "could be entirely satisfied that the product was causing damage." *Id.* at 419, 681 P.2d at 1063. In *Folks*, the Kansas Supreme Court succinctly reviewed the evidence justifying punitive liability in *Wooderson*:

> [T]he defendant [in *Wooderson*] ignored scientific and medical evidence that use of its product caused serious damage. [Defendant] continued to use the product, played down its harm, and gave physicians no warning of the dangers involved.

243 Kan. at 78, 755 P.2d at 1336. This analysis could apply almost verbatim to the actions of Texaco in this case. Texaco ignored scientific and medical evidence linking benzene exposure to leukemia, finding this evidence "reasonably certain" only when OSHA issued its emergency temporary standard in 1977.[30] Texaco further

[30] Although the point was disputed at trial, there was testimony that Texaco was required by law to warn its customers of the 1977

played down the carcinogenic dangers of benzene exposure by couching this danger in language incomprehensible to virtually everyone. Like the defendants in *Wooderson* and *Tetuan*, the jury in this case could reasonably find that Texaco "knowingly embarked upon a course of conduct dangerous to the public, motivated by private gain." *Folks*, 243 Kan. at 79, 755 P.2d at 1337.

Defendant next contends that the size of the punitive award in this case is so excessive as to warrant the inference that it is the result of passion and prejudice. In reviewing a jury's punitive damage award, the relevant factors under Kansas law include:

> the actual damages sustained, the actual damage award, the circumstances of the case (the nature, extent, and enormity of the wrong), the intent of the party committing it, the relative positions of the plaintiff and the defendant, the defendant's financial worth and the plaintiff's probable litigation expenses.

Folks, 243 Kan. at 78, 755 P.2d at 1336. The jury determined actual damages in the amount of $9,025,000. Thus, the punitive award exceeds actual damages by less than 3 to 1. Although excessiveness is not determined by any fixed ratio of actual to punitive damages, the Kansas Supreme Court has affirmed punitive damage awards in which the ratio is as high as 30 to 1, and even more recently in which the punitive award exceeded actual damage by 10 to 1. *Sampson v. Hunt*, 233 Kan. 572, 665 P.2d 743 (1983); *State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 747 P.2d 1326 (1987). In this case, the enormity of the wrong is revealed by the nature of the potential injury as well as the number of persons who were endangered by Texaco's conduct. Because the specific danger posed by benzene in this case is the de-

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emergency standard issued by OSHA. Moreover, even though Texaco did send its customers the 1977 OSHA standard, defendant continued to dispute the necessity of this standard in its private communications and advocated its repeal. *See supra* section IV.F.

velopment of an invariably fatal cancerous disease, the extent of the harm done to the particular individual is obvious. Moreover, the conduct of Texaco in this case was not directed toward any specific individual. By introducing its defective product into the stream of commerce, Texaco risked injury to anyone in the general population who happened to be exposed to its benzene. With respect to Texaco's intent in marketing benzene without sharing its information with its purchasers, there was sufficient evidence from which a jury could also infer profit motivated conduct. And as already discussed, the relative positions of Texaco to Mellen, a company of some 13 employees, as well as to others in the distribution chain, was one of nearly complete dependance upon the manufacturer to supply them with the information that only Texaco actually possessed.

Finally, plaintiff introduced evidence establishing Texaco's net worth to be $8,105,000,000. After taxes, Texaco's annual net earnings total some $1,304,000,000. The jury's award of $25,000,000 in punitive damages therefore represents 0.31% of Texaco's net worth and 1.92% of its annual net earnings after taxes. In a recent survey of punitive damage awards from several jurisdictions, the Seventh Circuit found a typical ratio for such damages to a defendant's net worth to be around one percent. *Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990). The court agrees with defendant that 25 million dollars is indeed a staggering sum. Yet the court must also consider this award in light of the underlying punishment and deterrent purposes of punitive damages. This purpose would be ill served if large manufacturers of chemical products, whose conduct recklessly and wantonly exposes the public to grave danger, could mitigate their punitive liability simply by urging a comparison with the amount that other juries have determined was necessary to punish and deter the conduct of other defendants with other financial conditions. The manufacturer in this case is one of the largest

corporations in the world, and it is difficult if not impossible to determine what amount is sufficient and necessary to deter it and others from engaging in similar conduct in the future. *See Iola State Bank v. Bolan*, 235 Kan. 175, 193, 679 P.2d 720 (1984). The court's review of the jury's award is further informed by the type of conduct that the punitive award in this case is meant to punish and deter. This is a warning case in which it was alleged and proven to a jury that Texaco, notwithstanding its actual knowledge of the carcinogenic danger of benzene, chose not inform its customers until "persuaded" to the contrary by governmental agencies. Providing an adequate warning of dangers for which there is reasonable, although not conclusive, scientific evidence is an inexpensive method by which the manufacturer can allow the purchaser or user to make an informed decision whether to expose himself or others relying upon him to this potential danger. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242, 251 (Fla. Dist. Ct. App. 1984), *review denied*, 467 So.2d 999 (1985); *Ragsdale Bros., Inc. v. Margo*, 693 S.W.2d 530, 536 (Tex. Ct. App. 1985), *rev'd on other grounds*, 721 S.W.2d 832 (1986). By reserving this information for itself, and unreasonably expecting unspecialized distributors or users to discover this danger through their own devices, Texaco deprived its customers of this choice. Considering all the evidence in light of the relevant factors, and giving the due deference required under Kansas law and the Seventh Amendment to the jury's determination of the amount necessary to punish and deter defendant and other manufacturers from such conduct in the future, the punitive award is not so excessive as to shock this court's judicial conscience. Thus, the court rejects defendant's contention that the punitive damage award was motivated by passion, prejudice or bias.

As a further indicium of alleged passion and prejudice, defendant also draws the court's attention to the conduct of some of the jurors after the verdict was announced. As the jurors left the courtroom, Mrs. Mason and her children stood by the plaintiff's table to thank the jurors, as is permitted in this court. Mrs. Mason and some of the jurors briefly embraced one another, and it is alleged that these jurors had tears in their eyes. It is unclear from the affidavits filed by defendant's counsel whether the jurors or Mrs. Mason initiated this emotional contact, and the court took no particular notice of this event.

Defendant raises an argument of first impression in this court's 23 years of observing successful litigants expressing gratitude to jurors leaving the courtroom. Mrs. Mason has lived with this case and the death of her husband for over 11 years. After hearing the evidence over the course of three months, the jurors deliberated for two more weeks in a climate that was perhaps stressful at times. The entire ordeal for both the litigants and the jurors was undoubtedly a grueling and emotional ordeal, and if Mrs. Mason was crying when she hugged a juror, the court can well imagine that this might elicit a like response from the juror. The court cannot infer with the same confidence as defendant that this modest expression of emotion was the result of passion and prejudice, as opposed to a natural response to evidence indicating that plaintiff had been seriously aggrieved by defendant's wrongful conduct. As the Tenth Circuit has noted for cases involving claims of outrageous conduct:

> [I]t is not a jury's duty to set aside, even if it were possible, "all the decencies of human emotion when called upon to decide controversy," although it is their duty "not to allow emotion to overcome fact, not to allow sympathy to overcome reason, not to allow desire for result to overcome justice."

Malandris, 703 F.2d at 1168-69 (quoting *Barnes v. Smith*, 305 F.2d 226, 229 (10th Cir. 1962)). In the

court's view, the jury performed this difficult balancing act admirably. Finding nothing in the verdict or otherwise to indicate improper motivations in rendering a verdict supported by the evidence, the court will not disturb the damage awards.

C. Due Process Violation

Finally, defendant contends that the punitive damage award violates the due process clause of the Fourteenth Amendment. Specifically, defendant alleges that the jury imposed punitive damages with only vague and inadequate guidance from the court's instructions. Because defendant concedes that the court's punitive damage instructions were generally consistent with the statements of the Kansas Supreme Court,[31] (Dkt. No. 494, at 14), the court takes this as a challenge to the constitutionality of the punitive damage standards under Kansas law. Defendant supports its argument by referring the court to concurring opinions from two recent United States Supreme Court cases indicating a future willingness to review state punitive damage standards under a due process challenge. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 87-88 (1988) (O'Connor, J., concurring in part); *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring).

The court doubts whether the detailed punitive damages standards in Kansas suffer from the constitutional infirmity suggested by the concurrence in *Crenshaw* and *Browning Ferris*. *See Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297 (D.N.J. 1990) (punitive damages imposed under detailed jury instructions did not violate due process even though state law imposed no ceiling nor required any relation to compensatory damages). In any event, the court finds it unnecessary to

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[31] *But see* section V.D.

consider this argument on the merits. Two trials and two opportunities to raise this argument have come and gone, but only now has defendant's objection to this instruction become specific. *See Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1295-96 (7th Cir. 1987) (defendant's failure to object to punitive damages instruction on grounds that it did not provide jury with any guidance establishes this instruction as law of the case). Therefore, the court will not address an allegation of error that it had no opportunity to correct prior to the jury's deliberations. *E.g., Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1514 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 485 (1985).[32]

VIII. *Conclusion*

In any trial, and particularly a trial of almost four months that occupies well over sixty volumes of printed transcript,[33] perfection cannot be guaranteed. But neither defendant nor any other litigant is entitled to a perfect trial—only to one that is fair. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984); *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 877 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 837 (1990). The

[32] The Tenth Circuit apparently allows consideration of such due process challenges even if no timely objection was made at the proper stage of trial to the state punitive damage standards. *Malandris*, 703 F.2d at 1173; *cf. Crenshaw*, 108 S. Ct. at 1651 (Court would not pass on constitutional challenges to punitive damages not raised below). The *Malandris* decision provides no guidance as to when such a review is appropriate, and the court therefore assumes it is a matter of discretion. Given the possibility of an impending pronouncement on this issue from the United States Supreme Court, *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989), *cert. granted*, 58 U.S.L.W. 3625 (U.S. Apr. 2, 1990) (No. 89-1279), as well as defendant's failure to raise a timely objection before the jury retired, the court elects not to address this issue.

[33] According to the court clerk's records for the two trials, the amount of trial time spent in this case now totals some 93 days or 468 hours.

court has given thorough consideration to each of defendant's well-briefed arguments and has even changed previous rulings on critical issues to defendant's favor. The ultimate decisions in this case, however, were a matter for the jury, not the court, to determine. The court will not disturb the jury's judgment, which finds substantial support under both the evidence and applicable law.

IT IS BY THE COURT THEREFORE ORDERED that defendant's motion for judgment notwithstanding the verdict, or alternatively for a new trial (Dkt. No. 494) be denied.

At Wichita, Kansas, this 6th day of July, 1990.

/s/ Frank G. Theis
FRANK G. THEIS
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Case Number: 78-1337

DIANA L. MASON, Individually and as Administratrix of the Estate of Otis W. Mason, Deceased

v.

TEXACO, INC., a corporation

JUDGMENT IN A CIVIL CASE

[Filed Jan. 24, 1990]

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the plaintiff, Diana Mason, and against the defendant, Texaco, Inc. as follows:

Compensatory damages	$ 9,025,000.00
Punitive damages	25,000,000.00

Considering all the fault at 100%, the percentage of fault attributed to Texaco is 100% and judgment is entered

accordingly in favor of Diana Mason and against Texaco in the amount of $34,025,000.00

Approved:

/s/ Frank G. Theis
FRANK G. THEIS
United States District Judge

RALPH L. DELOACH
Clerk

/s/ Anne Butler
(By) Deputy Clerk

Date: January 24, 1990

Entered on Docket 1-25-90

APPENDIX C

[Excerpts from District Court's Exclusionary Ruling (Tr. 5205-5207)]

CROSS EXAMINATION

[5205] QUESTIONS BY MR. PETERSON:

Q. Have you determined what, you understand Texaco was in a lot of different types of business?

A. Yes.

Q. And have you made any determination as to what the net profit was in terms of benzene sales?

MR. MICHAUD: Your Honor, may I approach the bench?

THE COURT: Yes, come up.

(Whereupon, the following was had at side bar:)

THE COURT: I see where he is going. I don't [5206] think we need to argue it, I would sustain the objection.

MR. MICHAUD: Last time the Court told you you couldn't go into divisions or chemicals.

MR. PETERSON: Wait a second. Am I not entitled, Your Honor, and I'd like to at least be heard. He wants to bring out everything he can on the financial statements. You told him not to get into this week, month, year thing.

THE COURT: He didn't.

MR. MICHAUD: I didn't get into it at all.

MR. PETERSON: Why can't I ask the question whether he has done it, what's wrong with it?

THE COURT: Doesn't have any relativity about the product, it's a company.

MR. PETERSON: But the jury, Your Honor, I respectfully disagree with you. The jurors are entitled to look at any and all aspects of the financial statement

that they want to. They are not handcuffed and he has put in everything. He has put in the moon and the sky, I should have a right to show the other side of the coin.

THE COURT: On punitive damages the only [5207] thing that is the net wealth, you don't separate it into divisions or whether they sell Quaker Oats or clothes pins.

MR. PETERSON: But you don't keep it from the jury, they are entitled to consider any of it.

THE COURT: Well, that's why I'm not sending in the financial statements. If you want them to roam around, we could but I'm going to sustain the objection.

(Resuming in the hearing of the jury:)

MR. PETERSON: I have no further questions.

* * * *

[Excerpts from District Court's Observations
(Tr. 3731-3732)]

[3731] * * * And I felt before and I still feel and I'm trying to decipher that in my own mind, thinking about the old evidence but if I look at the evidence here, I think they have got enough to go to the jury but he hasn't put all of his case on yet and that's why you ordinarily wait until the last witness so that the Court has all of the evidence before it and nobody can accuse him of conjecture because once you put it in, it's there and it is prejudicial. If there is no issue of punitive damages, there is no doubt that the [3732] financial statement of a wealthy defendant is prejudicial. It's also mighty germane where there is an issue of punitive damages.

* * * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-3169

TEXACO, INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS and HONORABLE FRANK G. THEIS,

Respondent,

DIANA L. MASON, Individually and as Administrator of the Estate of OTIS W. MASON, Deceased and ASHLAND CHEMICAL COMPANY, a Division of Ashland Oil, Inc., a corporation,

Real Party in Interest.

ORDER

[Filed Aug. 31, 1989]

Before SEYMOUR, TACHA, and BALDOCK, Circuit Judges.

This is an original proceeding in the nature of prohibition or mandamus. Petitioner seeks an order of this court compelling the respondent court to vacate a portion of an order which will permit retrial of certain issues pertaining to the award of punitive damages in the underlying litigation.

The petition for writ of mandamus or prohibition is denied for the reason that petitioner has not shown a right to relief that is clear and indisputable.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 78-1337-T

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,
Plaintiff,

vs.

TEXACO, INC.,
Defendant.

OPINION AND ORDER

[Filed Jun. 19, 1989]

This case is before the court on plaintiff's motion to review costs taxed by the clerk and on defendant's motion to preclude a new trial as to punitive damages. The court will address plaintiff's motion first. The Tenth Circuit reversed and remanded this matter for a new trial. *See* 862 F.2d 242 (1988). Following remand the clerk taxed the costs of appeal incurred by defendant Texaco, Inc. against plaintiff, Diana L. Mason. Plaintiff moves to set aside the award of costs against her on the ground that defendant is not a "prevailing party" entitled to costs under Rule 54(d) of the Federal Rules of Civil Procedure. That Rule provides in pertinent part:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . .

Fed. R. Civ. P. 54(d). Plaintiff argues that there is no prevailing party entitled to costs until after the retrial

of this matter. Defendant asserts that costs were properly taxed pursuant to the Federal Rules of Appellate Procedure.

Rule 39 of the Federal Rules of Appellate Procedure provides in pertinent part:

> Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; *if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered;* if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.
>
> . . . .
>
> Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal *shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.*

Fed. R. App. P. 39(a), (e) (emphasis added.) The Tenth Circuit reversed the judgment of this court and made no order regarding costs; therefore, this court must tax costs against plaintiff appellee under Rule 39 of the Federal Rules of Appellate Procedure. Rule 54(d) of the Federal Rules of Civil Procedure is inapplicable.

The clerk taxed the cost of the transcript, the filing fee, and the premiums paid for the costs of the supersedeas bond, for a total of $63,737.50. Plaintiff does not challenge the amounts taxed. The court finds that the amounts taxed are proper. The court therefore must deny plaintiff's motion to review costs at this time. Should the plaintiff ultimately prevail, a different result on the overall costs may result.

The court has set this matter for trial to commence September 19, 1989. Defendant has filed a motion to preclude a new trial as to punitive damages. In the first trial of this matter, the jury found defendant liable for actual damages, but made no award of punitive damages. Plaintiff filed a motion for new trial on several issues, including the issue of punitive damages. The court denied plaintiff's motion for a new trial. Defendant appealed the judgment against it. Plaintiff did not cross-appeal from the denial of a new trial on punitive damages. Defendant seeks to preclude the submission of punitive damages to the jury on retrial, arguing that the unappealed ruling on punitive damages is the law of the case.

According to Professors Wright, Miller, and Cooper, there are four general categories of law of the case: (1) the adherence of a court to its own prior rulings in an ongoing case; (2) the obligation of a court to obey the ruling of a higher court; (3) the respect that one judge or court owes the rulings of another judge or court in the same case or in closely related cases; and (4) the consequences of failure to appeal an issue or to preserve an issue for appeal. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 788 (1981). The present case appears to fall within the fourth category of law of the case.

An order denying a motion for new trial is not an appealable order. 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2818 (1973). Thus, plaintiff could not appeal from the denial of her motion for new trial and she had no reason to appeal from the judgment because the judgment was in her favor. The defendant cites one case which is arguably relevant to the present situation. In *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 206 n.22 (4th Cir. 1982), the court stated:

> The sole issue before the district court upon remand is that of compensatory damages. The district court's suggestion that if a new trial were ordered

> on apeal it would be conducted as to both punitive damage liability and compensatory damages is of no force. The district court denied plaintiff's motion for a new trial on the punitive damage liability issue, and plaintiffs did not appeal from that order. This ruling, unappealed, was not in consequence subject to defense by Eastern on appeal and Eastern is entitled to have it treated as the law of the case. *See* F. James & G. Hazard, *Civil Procedure* § 11.5 (2d ed. 1977).

This statement is dicta. Further, the decisions of the Fourth Circuit are not binding on this court. Additionally, the court believes that it is bad law. The defendant has not brought any controlling authority to the court's attention and the court declines to follow this statement from the Fourth Circuit.

Under the facts of this case, the court finds that resubmission of the issue of punitive damages is appropriate. Punitive damages were an integral part of this case from its inception. In any case where punitive damages are claimed, the plaintiff must present enough evidence of wanton or willful conduct by the defendant to initially convince the trial judge that there is an issue of fact to be submitted to the jury. Having submitted the issue to the jury, the court instructs the jury that they have the option or right to award punitive damages, in addition to actual damages, *if they so desire*. The court has no knowledge of any reported case in which, liability having been found on the issue of compensatory damages, the finder of fact was required to make an award of punitive damages. Hence a motion for a new trial on that issue alone where the movant has prevailed on the issue of compensatory damages would be a useless motion.

In this case, the plaintiff presented sufficient evidence to support punitive damages. The fact that the original jury did not make an award of punitive damages does not mean that another jury on retrial of the case would not. The absence of a punitive damage award here can

probably be explained by the high value the jury placed on plaintiff's compensatory damages. Under the state of the evidence presented, it is the court's opinion that a lesser amount of compensatory damages and an award of punitive damages would have been a more likely result.

The case was reversed by the Tenth Circuit because of error in two of the court's instructions on Kansas tort law. Plaintiff's motion for new trial on the punitive damage issue was unnecessary and was a procedural action by plaintiff's counsel for which plaintiff should not be penalized on retrial. Courts are for the purpose of doing justice, not rewarding legal tactics which inhibit justice. The days of procedural maneuverings have virtually disappeared under the Federal Rules of Civil Procedure and Evidence. To deprive the plaintiff of having a new trial on both actual and punitive damages would result in a grave injustice here. The plaintiff is entitled to have the issue considered both in efforts for settlement as well as in the retrial of the case.

In denying plaintiff's motion for a new trial on the issue of punitive damages, this court was affirming what at that time appeared to be a valid verdict by the jury based on all the evidence in the case. This court's action in denying a new trial was not intended to be and should not be considered a preclusive ruling on the punitive damage issue in a new trial.

IT IS BY THE COURT THEREFORE ORDERED that plaintiff's motion to review costs taxed by the clerk is hereby denied.

IT IS FURTHER ORDERED that defendant's motion to preclude a new trial as to punitive damages is hereby denied.

At Wichita, Kansas, this 19th day of June, 1989.

/s/ Frank G. Theis
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-2220

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,
Plaintiff-Appellee,

v.

TEXACO INC.,
Defendant-Appellant,

v.

ASHLAND CHEMICAL COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Kansas
(CIV. No. 78-1337)

[Filed Nov. 28, 1988]

Gerald L. Michaud (Richard D. Cordry and Dwight A. Corrin of Corrin & Krysl with him on the briefs) of Michaud, Cordry, Michaud, Hutton & Hutton, Wichita, Kansas, for Plaintiff-Appellee.

Ken M. Peterson (Robert W. Coykendall with him on the briefs) of Morris, Laing, Evans, Brock & Kennedy, Chartered, Wichita, Kansas, for Defendant-Appellant.

Wesley A. Weathers of Weathers & Riley, Topeka, Kansas, for Defendant-Appellee.

Before ANDERSON, BALDOCK and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

This products liability case involves claims of pesonal injury and wrongful death under Kansas law. Jurisdiction was based upon diversity of citizenship. 28 U.S.C. § 1332. Following a fourteen-week trial, the jury returned a verdict against defendant Texaco Inc. (Texaco) and in favor of Diana L. Mason, individually and as administrator of the estate of Otis Mason (Mason), for damages arising from the death of Otis Mason. The jury found that Otis Mason developed leukemia and died after being exposed to benzene produced by Texaco. Texaco moved for a judgment notwithstanding the verdict or for a new trial. Texaco's motion was denied, and Texaco appeals, asserting numerous errors including: the incorrect application of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. § 525 (1982); failure to submit to the jury the comparative fault of defendant Ashland Chemical Company as a phantom defendant after Ashland Chemical Company was dismissed by directed verdict; and erroneous jury instructions. We agree the district court's jury instructions were in error. Accordingly, we REVERSE and REMAND for a new trial.

In 1977, Otis Mason was serving in the United States Coast Guard as an instructor at the Coast Guard Engineering School at Yorktown, Virginia, when doctors diagnosed his condition as acute myelocytic leukemia. Otis Mason filed this lawsuit on August 14, 1978, alleging that his leukemia was caused by exposure to benzene, a solvent used in the classroom in a motor oil test kit. He died from leukemia on December 10, 1979. Thereafter, his widow, Diana L. Mason, was substituted as plaintiff in the personal-injury action for the pain and suffering, and wrongful death of Otis Mason. Mason alleged that the manufacturers and distributors of the benzene to which Otis Mason was exposed were liable for

his injuries and death primarily because of their failure to warn adequately of the hazards of benzene inhalation.

Originally, Mason named as defendant Gerin Corporation (Gerin), the manufacturer of the kit which Otis Mason used to test properties of motor oil. Later, the complaint was amended to state claims against Gerin's supplier, Dooner & Smith Chemical Company (Dooner & Smith); and Dooner & Smith's suppliers, Mellen Chemical, Inc. (Mellen), Ashland Chemical Company (Ashland), and Texaco. By the time of trial, Texaco and Ashland remained as defendants in the lawsuit. At the conclusion of plaintiff's case, the court granted defendant Ashland's motion for directed verdict. The case was submitted against Texaco, although other parties, except Ashland, were listed on the verdict form for comparative-fault assessments. The jury found that the total damages were $9 million and that Texaco was 35% at fault. Judgment against Texaco was entered for $3.150 million.

I. SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940

Texaco asserts two reasons the lower court erred in holding that the claims were not time-barred by the Kansas statute of limitations. First, the court misapplied the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-591 (1982), to exclude from the Kansas limitation period the time during which Otis Mason was placed on the "temporary disability retired list." Second, the court misapplied the Act to Otis Mason, a career military employee without any showing of disability to bring legal suit.

The tolling provision of the Soldiers' and Sailors' Civil Relief Act of 1940, § 525, provides in part as follows:

> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, . . . for the bringing of any action

> or proceeding in any court, . . . by or against any person in military service or by or against his heirs, executors, administrators, or assigns.

The Act bars any period of military service from being included in computing a statute of limitations for or against a person in the military service.

The Act defines "person in the military service" to include those in the Coast Guard. "Military service" means "active duty" under the Act, and "active duty" includes "the period during which a person in military service is absent from duty on account of sickness, wounds, leave or other lawful cause." 50 U.S.C. app. § 511(1) (1982).

It is undisputed that in September 1977, Otis Mason was diagnosed as having acute myelocytic leukemia. On March 15, 1978, he was placed on the "temporary disability retired list." On November 5, 1979, Otis Mason was permanently retired, and on December 10, 1979, he died as a result of leukemia. The question presented is whether placement on the "temporary disability retired list" is a "discharge from active service" or merely an "absen[ce] from duty on account of sickness," as anticipated by § 511(1). Under the former, a statute of limitations is not tolled; under the latter, the statute of limitations is tolled. We hold that placement on the "temporary disability retired list" constitutes "absen[ce] from duty on account of sickness" under the Act, and therefore the period of limitations provided by the Kansas two-year statute of limitations, Kan. Stat. Ann. § 60-513(a) (1983), was tolled from March 15, 1978, until November 5, 1979. *See Cruz v. General Motors Corp.*, 308 F. Supp. 1052 (S.D.N.Y. 1970).

Texaco further argues that the lower court erred in applying the Soldiers' and Sailors' Civil Relief Act of 1940 to Otis Mason, a career military employee. Citing *Pannell v. Continental Can Co.*, 554 F.2d 216 (5th Cir. 1977), Texaco urges this court to adopt a broad rule that

the tolling provision of § 525 of the Soldiers' and Sailors' Civil Relief Act of 1940 does not apply to a career serviceman who has not shown that military service handicapped him from asserting a claim. Although the court in *Pannell* sought to interpret § 525, the court's conclusion is predicated upon a combined reading of §§ 521 and 525. Section 521 of the Act provides for stay of proceedings and requires the serviceman to demonstrate that his status creates an inability to fully assert or defend a claim. Section 525 contains no such condition precedent. Even so, the court in *Pannell* imposed upon § 525 the requirement of § 521 and concluded that the tolling provision of the Soldiers' and Sailors' Civil Relief Act of 1940 was inapplicable to a career serviceman who has not shown that he was handicapped by his military service from asserting any claim he had prior to the expiration of the prescribed period. *Pannell*, 554 F.2d at 225. We cannot accept this interpretation of § 525 of the Soldiers' and Sailors' Civil Relief Act of 1940.

In our view, the language of the Soldiers' and Sailors' Civil Relief Act of 1940, § 525, is clear and unambiguous. We find no reason to ignore the plain meaning of the statute, and we are persuaded that the correct course to follow is set forth in *Ricard v. Birch*, 529 F.2d 214 (4th Cir. 1975); and *Bickford v. United States*, 656 F.2d 636 (Ct. Cl. 1981). The career status of Otis Mason does not negate the application of § 525. The only condition to § 525 is military service. That condition was met during Mason's placement on the "temporary disability retired list," and therefore the period of limitations was tolled from March 15, 1978, until November 5, 1979. Mason's naming of Texaco as a party on July 14, 1980, was within the period of limitations.

II. COMPARATIVE FAULT

Texaco next contends that the court erred in not submitting to the jury Ashland's possible comparative fault. The court refused to include Ashland as a phantom de-

fendant on the verdict form for determination of comparative fault because Ashland had been granted a directed verdict at the close of the plaintiffs' case. Under Kansas law, all types of fault, regardless of degree, are to be compared in order to apportion the causal responsibility for the damages. *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 454 (10th Cir. 1982).

We have stated previously in *Hardin* that a scintilla of evidence is not sufficient to justify submitting a nonparty to the jury as a phantom defendant, and that the judge should apply the directed verdict standard when deciding which nonparties to submit as phantoms on the verdict form. *Id.* at 459 n.7. Although the standard for granting a directed verdict has varied somewhat over time, *compare Cockrell v. Boise Cascade Corp.*, 781 F.2d 173, 177 (10th Cir. 1986), with *Thompson v. Kerr-McGee Refining Corp.*, 660 F.2d 1380, 1389 (10th Cir. 1981), *cert. denied* 455 U.S. 1019 (1982), we find no error in the legal standard applied by the trial judge. We do not review the correctness of the judge's factual findings as they apply to the issue of naming phantom parties on the verdict form because retrial of this case may present new factual issues on the propriety of including the phantom parties.

We do note, however, that the propriety of the directed verdict granted to Ashland at the close of the plaintiff's case is not before this court. Mason has not raised that issue on appeal. Texaco had no standing to challenge the ruling below, *see e.g.*, *Price v. Greenway*, 167 F.2d 196, 200 (3d Cir. 1948); *Hayes v. Tootle-Lacy Nat'l Bank*, 72 F.2d 429, 431-32 (10th Cir. 1934), and now cannot resurrect the issue in this court.

III. JURY INSTRUCTIONS

Texaco asserts that in instructing the jury the trial court deviated from Kansas law on several issues relating to Texaco's duty to warn of product hazards. Specifically,

Texaco argues the court erred in instructing the jury contrary to law on the bulk seller's duty to warn (No. 6), the duty to train salesmen (No. 13), and also by invading the province of the jury to determine the content and form of the warning required in this case (Nos. 16, 6, and 23).

In reviewing Texaco's challenge to the jury instructions, we consider the instructions as a whole to determine whether they "state the law which governs and provided the jury with an ample understanding of the issues and the standards applicable." *Ramsey v. Culpepper*, 738 F.2d 1092, 1098 (10th Cir. 1984). In a diversity case, we apply the substantive law of the forum. *Brownlow v. Aman*, 740 F.2d 1476, 1490 (10th Cir. 1984). " 'The appellate standard of review to be applied by the court is clear: an error in jury instructions will mandate reversal of a judgment only if the error is determined to have been prejudicial, based on a review of the record as a whole.' " *Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1271 n.19 (10th Cir. 1988), citing *Durflinger v. Artiles*, 727 F.2d 888, 895 (10th Cir. 1984).

A. Duties Owed by a Bulk Supplier

The leading case in Kansas on the liability of a bulk supplier is *Jones v. Hittle Service Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976). In *Jones*, the Kansas Supreme Court held that the manufacturer and bulk seller of liquefied petroluem gas "fulfills his duty to the ultimate consumer when he ascertains that the distributor to whom he sells is adequately trained, is familiar with the properties of the gas and safe methods of handling it, and is capable of passing on his knowledge to his customers." *Id.* at 1394.

Essentially, the holding imposes upon the bulk seller the obligation to sell only to knowledgeable and responsible distributors. *Jones* does not impose a duty on the

bulk seller to warn the ultimate consumer, and specifically does not impose a duty on the bulk seller to police the adequacy of warnings given by the distributor. "If the product is sold in bulk, adequate warning to the vendee is all that can reasonably be required." *Id.* at 1393.

Texaco asserts that Jury Instruction No. 6, the court's "stairstep guide," imposes a duty upon Texaco which exceeds the obligations settled under Kansas law. The third step in the instruction in part advises the jury as follows:

> Such third issue would cause you to decide whether any or all actions taken by Texaco were sufficient and adequate to reasonably inform and warn its immediate purchaser of such dangerous carcinogenic propensity of benzene, and safety precautions to avoid exposure, and to take reasonable measures to determine that such purchaser was capable of warning others in the chain of distribution to ultimate consumers. Should you find that Texaco fulfilled and discharged its legal duty to warn *and take reasonable steps to see that its distributor knew and complied with its duty to inform*, then you would return a verdict for defendant Texaco.

(Emphasis added.) Instruction No. 6 advises the jury that Texaco had a legal duty to police the actions of the distributor. The language "knew and complied with" exceeds the obligation to sell to a knowledgeable vendee who was capable of passing on the warnings.

Although Mason argues that at trial Texaco failed to object to the language "knew and complied with," the record demonstrates that counsel for Texaco objected to Instruction No. 6, that he detailed his objections paragraph by paragraph, and that he specifically objected to the clause "and take reasonable steps to see that its distributor knew and complied with its duty to inform." Texaco more than adequately preserved its objection to Instruction No. 6.

The trial court's Instruction No. 6 pertaining to the bulk seller's duty to warn was contrary to Kansas law as set forth not only in *Jones*, but also in *Hendrix v. Phillips Petroleum Co.*, 203 Kan. 140, 453 P.2d 486, 496 (1969). *See generally, Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 661 P.2d 348 (1983); *Younger v. Dow Corning Corp.*, 202 Kan. 674, 451 P.2d 177 (1969). In our view the trial court erroneously instructed the jury as to the applicable law.

B. Duty to Train Salesmen

Texaco next argues the trial judge erroneously instructed the jury that as part of the duty to warn, Texaco had a duty to train its salesmen. Instruction No. 13 provides:

> The defendant Texaco had a duty to adequately instruct and train their salesmen as to their product, benzene, in order that their salesmen take appropriate action and give appropriate advice to the purchasers and users of benzene. The violation of such a duty is negligence.
>
> The defendant had a duty to exercise a high degree of care in selecting, training and advising its salesmen.

We agree with Texaco that in so instructing the jury, the trial court erred. The instruction does not state Kansas law properly, and it dictates the method of conveying a warning in order for it to be found adequate by the jury.

Under Kansas law, a manufacturer has a duty to instruct a distributor or ascertain that he has been instructed in the use and handling of its commodities. *Hendrix*, 453 P.2d 486. While the central issue before the Kansas Supreme Court in *Hendrix* was the relationship of parties and the respective liabilities, the court also addressed the duty of the bulk seller to warn the distributor of the hazards of using its product. Plain-

tiffs brought suit against a distributor of liquefied petroleum gas as a result of an explosion in a private residence. The trial court entered judgment in favor of plaintiffs as against the distributor (Fortner), and in favor of the seller (Phillips) as against plaintiffs.

In *Hendrix*, plaintiffs claimed the trial court erred in failing to rule as a matter of law under the evidence that the manufacturer, Phillips, was negligent in its failure to adequately train the distributor, Fortner. The Kansas Supreme Court characterized the question as one of fact to be determined by the jury under proper instructions, and upheld the following instruction:

> You are instructed that defendant Phillips had a duty to instruct Fortner [distributor] or ascertain that he had been instructed as to the proceedings to be followed in the event of a leak in an L. P. gas system or explosion.
>
> In this connection it is not required that Fortner be educated or instructed as an expert in the field. Phillips has the duty to instruct or ascertain that Fortner has been instructed to the extent that he have such knowledge as is reasonable under the circumstances to give him information sufficient to take appropriate action and give appropriate advice to his customer. The violation of such duty is negligence.
>
> Phillips, once having fulfilled the above duty, cannot be held liable for Fortner's failure to take advantage of, use or impart to others such instruction.

Id. at 496. In approving the instruction, the Kansas Supreme Court stated: "A manufacturer of L. P. gas is under a duty to instruct a distributor or to ascertain that he has been instructed in the use and handling of its commodities." *Id.* at 496. Counsel for Mason proposed Instruction No. 13 in the instant case, and argued that it was based upon *Hendrix*. Texaco argued vociferously against giving Instruction No. 13 for the reason that it mandated a particular mode of communication (i.e., in-

structing and training its salesmen) rather than advising the jury on the *Hendrix* standard and seeking their determination on the issue of adequacy of warning. Texaco argues that this confusion of *method* with *content* of warning grossly misled the jury. We agree. In our view, Instruction No. 13 misinterpreted and improperly expanded the duty imposed upon Texaco under *Hendrix*.

In the trial judge's Opinion and Order denying post-trial motions, he justified the giving of Instruction No. 13 under the *Hendrix* case and also the case of *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978 (8th Cir. 1969). In our view, reliance upon *Sterling* was misplaced as well. In *Sterling*, plaintiff sought damages from a drug manufacturer as a result of the manufacturer's alleged failure to warn plaintiff's doctor of the side effects of the drug prescribed. The case was tried to the court, and judgment was entered for the plaintiff. The manufacturer appealed. The Court of Appeals for the Eighth Circuit held that the trial judge's *finding* that the manufacturer's detail men presented the most effective method of warning plaintiff's doctor was not clearly erroneous.

The *Sterling* holding arises from a trial to the bench where the judge functioned as the fact-finder. The duty which the *Sterling* trial court imposed in finding the facts was a "duty to make reasonable efforts to warn the medical profession of the side effects of the drug." *Id.* at 991. The *Sterling* trial court found *as fact* that failure of the manufacturer to instruct its detail force to warn the physicians constituted failure to make reasonable efforts to warn the prescribing physicians. The circuit court upheld the law applied by the trial court and declined to declare the findings thereunder to be clearly erroneous.

The *findings of fact* in *Sterling*, however, do not justify the instruction by the court below that Texaco had a *legal duty* to train salesmen. By so instructing the jury, the trial judge found facts, rather than instructing the jury on the legal duty and asking them to answer the question

of adequacy of warnings given, if any. This confusion of function and misstatement of law constituted prejudicial error.

C. Invading the Province of the Jury

Texaco next argues that the trial court's references to benzene as carcinogenic throughout the instructions "amounted to a virtual instruction that Texaco's warning of injury to blood-forming organs was inadequate." On this issue, Texaco submits three sources of error: Instructions Nos. 6 and 23, and the verdict form. Instruction No. 6, the "stairstep guide," reads in part as follows:

> On the other hand, in the first step, if you find both that benzene was the cause of Mason's leukemia, and that it was Texaco's benzene, you would proceed to answer the next issue, which is the state of the scientific knowledge to a reasonable degree of probable certainty in the time period of Mason's exposure to benzene. If you cannot find by a preponderance of the evidence that such scientific knowledge existed concerning a *dangerous propensity of benzene to cause carcinogenic (cancerous) blood disease* at the time of Mason's exposure, then your deliberations would cease and your verdict should be for the defendant. If you find that such scientific knowledge did exist to the extent that Texaco either knew it, or should reasonably have known about it, prior to and during Mason's exposure, then you would proceed to decide the next or third issue.
>
> Such third issue would cause you to decide whether any or all actions taken by Texaco were sufficient and adequate to reasonably inform and warn its immediate purchaser of such *dangerous carcinogenic propensity of benzene*, and safety precautions to avoid exposure, and to take reasonable measures to determine that such purchaser was capable of warn-

> ing others in the chain of distribution to ultimate consumers. Should you find that Texaco fulfilled and discharged its legal duty to warn and take reasonable steps to see that its distributor knew and complied with its duty to inform, then you would return a verdict for defendant Texaco. On the other hand, should you find by a preponderance of the evidence that the warnings were inadequate, defendant Texaco would be negligent, and you would then consider whether such negligence directly caused, wholly or in part, Mason's leukemia."

(Emphasis added.)

Instruction No. 23, the trial court's comment on the evidence, structured the dispute as to when benzene became recognized as a cause of cancerous blood diseases. The instruction reads in part:

> A further comment of the Court may be helpful in your decision on the existence of the state of scientific knowledge and defendant Texaco's duty to warn. Actually, on the basis of the evidence of scientific knowledge, two factors or elements of knowledge have been shown to exist. First, there is the dispute over whether and when benzene became recognized as a leukemia source, i.e., a cause of *cancerous* blood diseases; and secondly, at what level of exposure does the danger exist.

(Emphasis added.)

The verdict form reads in part as follows:

> 4. Do you find by a preponderance of the evidence that the actions taken by Texaco were insufficient and inadequate to warn Texaco's immediate purchaser of the dangerous *carcinogenic* propensity of benzene?
>
> Yes X No

* * *

5. Do you find by a preponderance of the evidence that Texaco did not take reasonable measures to determine that its immediate purchaser, Mellen, was capable of conveying adequate warning to others in the chain of distribution of benzene?

Yes X No

(Emphasis added.)

Texaco argues that these instructions and the verdict form shifted the focus away from the true liability question of whether Texaco adequately warned of the dangerous propensities of benzene. According to Texaco, the trial judge instructed the jury to consider whether Texaco had issued a warning of the possible cancerous nature of benzene. Texaco argues this instruction directed the jury to conclude, contrary to evidence, that Texaco's warning of injury to blood-forming organs was inadequate. Stated differently, Texaco argues that the trial court instructed the jury that any warning not containing the word "cancer" was inadequate as a matter of law.

Although Texaco's argument is alluring academically, a common-sense approach to the record reveals no error. The trial court's structure of the case in Instruction No. 6, the "stairstep guide," set out as a threshold issue the question of whether the stated level of scientific knowledge existed concerning a dangerous propensity of benzene to cause cancerous blood disease at the time of Otis Mason's exposure. If the jury believed that plaintiff's evidence failed on the issue, they were instructed to cease deliberation and render a verdict for the defendant Texaco. Consequently, in any deliberation on issues past the threshold issue, the jury could rely on its finding that the stated level of scientific knowledge existed regarding the carcinogenic properties of benzene at the time of Otis Mason's exposure. On this issue we perceive no error.

IV. OTHER ISSUES

Texaco raised additional issues which this court does not address in detail due to the necessity of a new trial. Three issues pertain to the applicability rather than content of jury instructions: No. 19, governmental standards; No. 32 "love of live" presumption; and No. 14, duty to test. Texaco also raised the scope of permitted expert testimony; the duty to warn of hazards already known to the employer; nondisclosure of the fact that Gerin was a named defendant; and excessive damages. In our view, each of these issues is fact-bound, and extensive discussion of these issues by us would be unproductive. As to the final issue, Instruction No. 23, the trial judge's comments on the evidence, the law is well settled. In light of the unfortunate necessity of a new trial, we do not decide these additional issues.

V. CONCLUSION

We conclude the jury was misled as to a bulk seller's duty to warn and duty to train salesmen. The jury could not have had a clear understanding that Texaco was only required to warn the purchaser Mellen of benzene's dangerous characteristics and ascertain that Mellen was informed and capable of passing on the warning. The instruction requiring Texaco to train salesmen has no basis in Kansas law. We conclude, therefore, that the jury instructions constituted reversible error.

The judgment against Texaco is REVERSED, and the case is REMANDED for a new trial.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 78-1337

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,
Plaintiff,

v.

TEXACO, INC., a corporation,
Defendant.

OPINION AND ORDER

[Filed Aug. 2, 1984]

This products liability case is presently before the Court on several post-trial motions from both parties. The plaintiff Diana L. Mason has filed a motion for new trial. The defendant Texaco, Inc. [Texaco] has filed a motion for judgment n.o.v. or, in the alternative, for a new trial. For the reasons that follow, these motions shall be denied.

I. Synopsis of the Facts.

In 1977, Otis Mason was serving in the U.S. Coast Guard as an instructor at the Coast Guard Engineering School at Yorktown, Virginia when he contracted leukemia. In 1978, Otis Mason filed this suit alleging that his leukemia was caused by exposure to benzene, a solvent used in the classroom in a lube oil test kit. Otis Mason died from his leukemia on December 10, 1979. His wife, Diana L. Mason [Mason], was substituted as plaintiff in this action, which then became a personal

injury action for the pain and suffering of Otis Mason before his death, and a wrongful death action. Mason asserted that the manufacturers and distributors of the benzene to which Otis Mason was exposed were liable for his injuries and death primarily because of their failure to adequately warn of the hazards of benzene inhalation.

After thirteen weeks of evidence, contention, and argument, the case was finally submitted to the jury for decision by means of special interrogatories. *See* Dk. No. 238. While Texaco was the sole defendant remaining at this point, the Court instructed the jury to consider and compare the possible fault of each person or company in the chain of distribution; from Texaco, the alleged manufacturer, to the U.S. Coast Guard, and including Otis Mason himself. The jury found that Otis Mason's leukemia had been caused by exposure to Texaco benzene and that Texaco had breached its duty to adequately warn of the dangers of benzene inhalation. The jury found Texaco to be 35 percent at fault and awarded $9 million as the total amount of damages suffered by Otis Mason and his family. Although the issue of punitive damages was submitted to the jury, they declined to award punitive damages against Texaco.

II. Mason's Motion for New Trial

Mason first asserts that a new trial is necessary because the Court erroneously instructed the jury to consider and compare the fault of not only Texaco but other persons and companies in the distribution chain. These non-parties whose possible fault the jury was asked to consider are referred to as "phantom parties" or "phantoms." *See* 3 Vernon's Kansas Statutes Annon. § 60-258b, p. 88 (1977 Concannon Supp.) (apparently the first usage of the term "phantom party" in Kansas). Mason claims that the evidence as to the possible fault of the phantom parties was insufficient for the Court to submit

to the jury the issue of the fault of the phantoms. The Court disagrees.

The standard for submission of a phantom to the jury for comparison of fault is that sufficient evidence must exist as to the phantom's fault so as to avoid a directed verdict were such a motion to be made. *Hardin v. Manitowac-Forsythe Corp.*, 691 F.2d 449, n.7 (10th Cir. 1982). The Court must accordingly view all the evidence in the light most favorable to the party asserting the submission of the phantom to the jury and give that party the benefit of all inferences which the evidence reasonably supports. *See Kirkendoll v. Newstrom*, 379 F.2d 694, 699 (10th Cir. 1967). The Court may refuse to submit a non-party to the jury as a phantom party only if reasonable minds could not find to a reasonable probability that the phantom's conduct caused or contributed to the plaintiff's injuries. *See Thompson v. Kerr-McGee Refining Corp.*, 660 F.2d 1380, 1389 (10th Cir. 1981), *cert. denied* 455 U.S. 1019 (1982).

The Court has reviewed the evidence in this case in the light most favorable to Texaco, the party requesting the submission of the phantoms to the jury. It is unnecessary to recite in detail here the evidence as to the possible fault of each phantom submitted to the jury. There was evidence that Mellen Chemicals [Mellen], which purchased the benzene from Texaco, failed to pass on to its purchasers the information that Texaco supplied it concerning the hazards of benzene, especially its carcinogenic characteristics. There was evidence that Dooner & Smith, which purchased the benzene from Mellen, failed to make any inquiry or investigation as to the hazardous characteristics of benzene. There was evidence that the Gerin Corporation, which purchased the benzene from Dooner & Smith and repackaged it as Gerin Solvent, failed to indicate on the label the chemical content of Gerin Solvent or what safety measures were necessary to prevent excessive benzene inhalation. There was also evidence that the U.S.

Coast Guard, which purchased the Gerin Solvent, did not require the Coast Guard instructors to take adequate safety measures to protect themselves from benzene exposure even though the instructors knew the Gerin Solvent to be benzene, and the Coast Guard knew of the carcinogenic propensities of benzene and of the applicability of O.S.H.A. safety regulations governing benzene exposure. Reasonable minds, viewing this evidence, could certainly differ as to whether the conduct of these parties contributed to the injuries of Otis Mason. The evidence was thus sufficient to justify the submission of each of these phantoms to the jury for comparison of fault. Further, the Court does not find the percentages of fault assigned by the jury to each phantom to be so unsupported by the evidence as to warrant a new trial.

There was also sufficient evidence to justify submission of Otis Mason's possible fault to the jury for comparison of fault. There was evidence that Otis Mason was very careful when using the Gerin Solvent in the classroom but that he often used it in the Hobby Shop with little or no ventilation. This evidence was sufficient to allow reasonable minds to differ as to whether the conduct of Otis Mason may have contributed to his injury. The submission of Otis Mason and the phantom parties along with the defendant Texaco to the jury for comparison of fault was not in error.

Mason next asserts that a new trial is necessary because the jury's failure to award punitive damages is against the clear weight of the evidence. The Court has great discretion to order a new trial on the issue of damages when the damages awarded are so unreasonably low as to cause an injustice. 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2807 (1973). As the Court indicated when it denied Texaco's motion for directed verdict on the issue of punitive damages, the issue was a very close one on which reasonable minds could differ. The jury found punitive damages to be inappro-

priate in this case. The Court respects the judgment of the jury and finds no reason to exercise its discretion to order a new trial in this case on the issue of punitive damages.

As a final basis for a new trial, Mason asserts that the Court erred in its instruction to the jury on Texaco's duty to warn. Texaco sold its benzene to Mellen in bulk; that is, in tank cars rather than in barrels or cans. Mason asserts that Texaco had a duty to convey a warning directly to the ultimate consumers of its product despite the fact that Texaco sold its benzene only in bulk. In Kansas, however, a bulk seller has satisfied his duty to warn if he conveys an adequate warning to the immediate purchaser and ascertains that the immediate purchaser is capable of conveying the warning to his consumers. *Jones v. Hittle Service Inc.*, 219 Kan. 627, 639 (1976). The Kansas Supreme Court has clearly stated "[i]f the product is sold in bulk, adequate warning to the vendee is all that can reasonably be required." *Jones*, 219 Kan., at 637. The Court's instruction on Texaco's duty to warn was lifted almost verbatim from the holding in *Jones*. *Compare* Dk. No. 236, Instruction 17 *with Jones*, 219 Kan., at 639. The Court's instructions to the jury correctly and adequately stated the extent of Texaco's duty to warn in this case. Mason's motion for new trial shall therefore be denied.

III. Texaco's Motion for Judgment N.O.V. or, in the Alternative, for New Trial.

Texaco enumerates three issues upon which it claims entitlement to judgment n.o.v. under Rule 50(b) of the Federal Rules of Civil Procedure. First, Texaco alleges that it fulfilled its duty to warn as a matter of law. Next, Texaco asserts that it had no duty to adequately train its salesmen and that the Court's instruction to the jury on this issue was erroneous. Finally, Texaco claims that it fulfilled its duty to test as a matter of law or that its

breach of that duty was not, as a matter of law, the proximate cause of Otis Mason's death. The Court has examined these arguments and finds them to be unpersuasive.

The Court has previously outlined the extent of Texaco's duty to warn based on the holding in the *Jones* case. *See supra* at 5. This duty is two-pronged. First, the seller in bulk must adequately warn the immediate purchaser of the product's dangers and second, the seller must take adequate measures to determine that its immediate purchaser is capable of passing this warning along to subsequent purchaser or consumers. *Jones*, 219 Kan., at 639.

The issue of the adequacy of a warning is ultimately a question of fact best left to the sound discretion of the jury. *See generally* Anno. 53 A.L.R. 3d 239 (1979). The adequacy of the warnings in this case was a peculiarly difficult factual question. Whether the warnings given by Texaco in this case were adequate depended upon the extent of knowledge about the dangerous characteristics of benzene available in the scientific community at the time the warnings were given, the mid-1970s. The evidence showed that during this period there was a tremendous surge in the amount of research directed at identifying the dangers of benzene inhalation. The amount of knowledge concerning benzene inhalation hazards grew rapidly during this time. Judging the adequacy of the warnings necessarily required determining the amount of information available to Texaco about benzene hazards at the time the warnings were given. In this case, the adequacy of the warnings given by Texaco based upon the scientific knowledge available at the time was a complex question on which the jury heard much conflicting testimony. The jury's findings on this issue would thus involve resolution of these conflicts in the evidence and an assessment of the credibility of the witnesses. Judgment n.o.v. is particularly inappropriate in such an instance.

See Joyce v. Atlantic Richfield Co., 651 F.2d 676, 680 (10th Cir. 1981); *Bertot v. School District No. 1, Albany County, Wyoming*, 522 F.2d 1171, 1178 (10th Cir. 1975). Texaco's motion for judgment n.o.v. on the duty to warn shall therefore be denied.

Texaco also requests judgment n.o.v. on the issue of the duty to train its salesmen, asserting that it has no such duty. A supplier in bulk has a duty to train its salesmen with respect to the dangers of the product so that the salesmen may convey that information to the purchasers. *See Hendrix v. Phillips Petroleum Co.*, 203 Kan. 140, 153 (1969) (approving an instruction to the jury placing a duty on an LP gas manufacturer to adequately train its distributor). This duty is imposed because a well-trained salesman is one of the most effective means of informing the purchaser of hazards or dangers associated with the product. *See Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978 (8th Cir. 1969). Some courts have found the information imparted through personal contact by salesmen or detailmen to so predominate in the mind of the purchaser as to counteract adequate written warnings given on or with the product. *See, e.g., Crocker v. Winthrop Laboratories, Div. of Sterling Drug, Inc.*, 514 S.W.2d 429 (Tex. 1974); *Love v. Wolf*, 249 Cal. App.2d 822, 58 Cal.Rptr. 42 (1967).

While the above cases deal with detailmen for drug companies, the duty imposed upon a seller of bulk chemicals to train its salesmen should be at least as strict if not stricter. Sellers of packaged drugs may affix warnings and hazard statements directly to the product or its container. A seller of bulk chemicals has no means to affix a warning to his product. A bulk seller must be more reliant upon its salesmen to convey the warnings to the purchaser than is a drug manufacturer since the bulk seller cannot attach warnings directly to his product.

Furthermore, while well-trained salesmen may be one of the most effective means to convey warnings to a pur-

chaser, they certainly are not the only means. Adequately-trained salesmen are only one means by which the duty to warn may be fulfilled. If the seller breaches his duty to train his salesmen, he still may convey adequate warnings to his purchasers by means of a material safety data sheet [MSDS] given to the purchaser, letters to purchasers, or other methods. Breach of the seller's duty to adequately train salesmen could not be found to be the proximate cause of the plaintiff's injuries if the seller adequately warned his purcasers of the products's hazards using some other means. Only if the seller failed to use other means to adequately convey warnings to the purchaser could the seller's breach of the duty to train its salesmen be found to have been a proximate cause of the plaintiff's injuries. The Court's instruction to the jury on the duty of Texaco to adequately train its salesmen adequately and correctly stated the law.

In addition, the evidence in this case clearly raised the issue of Texaco's breach of its duty to adequately train its salesmen. There was evidence that John Frothingham, the salesman for Texaco who made calls on Mellen in the 1970s, had not been instructed by Texaco as to the hazards of benzene. However, the evidence also showed that Frothingham was a chemical engineer. Whether Texaco had fulfilled its duty to adequately train its salesmen was an issue upon which reasonable minds could differ; judgment n.o.v. is thus improper. *Delano v. Kitch*, 663 F.2d 990, 1003 (10th Cir. 1981).

Lastly, Texaco asserts its entitlement to judgment n.o.v. on the issue of the duty to test. This duty, like the duty to adequately train salsemen, is closely intertwined with the duty to warn. A manufacturer has a duty to make such tests as are reasonably necessary to insure the safety of the product or the adequacy of the warnings. *See Lindquist v. Ayerst Laboratories, Inc.*, 227 Kan. 308, 319-20 (1980); PIK Civil 2d § 13.04. Whether a manufacturer has fulfilled its duty to make tests which are reasonably necessary is a question of fact. In this case, there was

evidence of the limited testing done by Texaco or on its behalf concerning the dangers of benzene inhalation but there was also evidence of the difficulties encountered in attempting benzene inhalation testing on animals. Viewing this evidence in the light most favorable to Mason, it is clear that reasonable minds could differ on this issue. Texaco's motion for judgment n.o.v. on this issue as well as on the other two issues previously discussed shall be denied.

Texaco has also enumerated several grounds that it believes demonstrate its entitlement to a new trial. A motion for new trial is addressed to the sound discretion of the trial court. *Walter v. Warner*, 298 F.2d 481 (10th Cir. 1962). Such a motion embraces all reasons which inhere in the integrity of the jury system itself. *Community Nat. Life Ins. Co. v. Parker Square Savings & Loan Ass'n*, 406 F.2d 603 (10th Cir. 1969). No error, however, justifies a new trial unless it affects the substantial rights of the parties. *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144 (10th Cir. 1978).

Texaco first asserts that this Court stated, in Instruction 7, a basis for strict liability in tort that is contrary to the "fault" concepts upon which Kansas bases all non-intentional torts. The Court, however, finds no error in its instruction.

The Court's instruction on the basis for the theory of strict liability in tort was lifted with only slight modification from the discussion of strict liability in the Restatement (Second) of Torts. *Compare* Dk. No. 236, Instruction 7, *with* Restatement (Second) of Torts §402A comment c (1965). The Kansas Supreme Court adopted the theory of strict liability as set forth in § 402A. *Brooks v. Dietz*, 218 Kan. 698, 702 (1976).

The Kansas Supreme Court later held that the Kansas comparative negligence statute, K.S.A. 60-258a, is ap-

plicable to actions brought on a theory of strict liability. *Kennedy v. City of Sawyer*, 228 Kan. 439, 452 (1980); *Albertson v. Volkswagenwerk Akliengesellschaft*, 230 Kan. 368, 373 (1981). That court, however, still recognizes that the theory of strict liability rests upon "social policy which commands that a manufacturer be deterred from producing defective and dangerous products." *Kennedy*, 228 Kan., at 450. Thus, Kansas courts simultaneously recognize the policy foundations of strict liability while virtually emasculating the theory through the application of the Kansas comparative negligence statute. *Cf. Prince v. Leesona Corp., Inc.*, 720 F.2d 1166, 1171 (10th Cir. 1983) (recognizing the incongruity between strict liability and the application of the Kansas comparative negligence statute); *Hardin*, 691 F.2d, at 454-455 (same). Yet, while the social policy underlying strict liability may not be advanced by the application of the Kansas comparative negligence statute, that policy, as defined by § 402A comment c, remains the basis for strict liability in Kansas. The Court's instruction to the jury that set forth the social basis for strict liability was not in error.

Furthermore, the Court properly instructed the jury to compare any fault of Texaco's with any fault of Otis Mason and the phantom parties submitted to the jury. *See* Dk.No. 236, Instructions 6, 28, 33. The jury was further instructed not to single out any one particular sentence or instruction but to consider the instructions of the Court as a whole. Dk.No. 236, Instruction 1. The adequacy of the instructions are not to be determined by examining an instruction out of context but rather by viewing the instructions as a whole. *Tuttle v. City of Oklahoma City*, 728 F.2d 456, 459 (10th Cir. 1984); *U.S. v. Jenkins*, 701 F.2d 850, 858 (10th Cir. 1983). Taken as a whole, the Court's instructions to the jury adequately and correctly stated the law of strict liability in Kansas.

Texaco next asserts error in the Court's instruction that when giving written warnings of product hazards,

"[s]pecial problems, particularly those that may lead to death or serious injury, should be placed in a section for emphasis." Dk.No. 236, Instruction 16. The MSDS used by Texaco to convey product information to purchasers during the timeperiod of the relevant benzene sales had a special section for "Health Hazard Data." Thus the Court's instruction on this point could not have been prejudicial to Texaco and does not warrant a new trial.

Texaco next asserts that Instruction 23 was an improper comment to the jury on the evidence. A federal judge may comment on the evidence in a jury trial so long as the comment is reasonable and so long as it is made clear to the jury that they are not bound by the views of the court. *Rasmussan Drilling, Inc.*, 571 F.2d, at 1154; *Tyler v. McDowell, Inc.*, 274 F.2d 890, 897 (10th Cir. 1960).

The Court's comment to the jury was simply that the experts on both sides agreed that it was impossible to determine, in any single case, at what level of benzene exposure a risk of contracting leukemia exists and that human tolerances or susceptibilities vary greatly. In the Court's opinion, the experts on both sides agreed to those statements although they may have defined particular words differently. These comments were certainly a reasonable attempt to clarify even slightly for the jury the massive amount of expert testimony offered during the course of this long and contentious trial.

Furthermore, the Court prefaced these comments by stating "[i]t is the Court' recollection . . . ." Dk. No. 236, Instruction 23. The Court also told the jury later in the instructions that the Court was not intending to express an opinion on the evidence in the case and that anything said or done which may have been perceived by the jury as an indication of how the Court would decide the case was to be disregarded. *See* Dk. No. 236, Instruction 50. The jury was clearly instructed that theirs was the sole

duty to decide the facts based upon the evidence. The Court's comment therefore was not improper.

Next, Texaco submits as error the Court's allowing several of Mason's expert witnesses to testify to previously undisclosed opinions. Texaco claims that the testimony given by some of Mason's expert witnesses was outside the scope of the summaries of their expected testimony given to Texaco by Mason before trial. This testimony, Texaco argues, should not have been admitted, citing *Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980), *cert. denied* 450 U.S. 918. The Court finds, to the contrary, that when correctly applying the rationale of the *Smith* case, the challenged testimony was properly admitted.

In *Smith*, the U.S. Court of Appeals for the Tenth Circuit has enumerated four factors to be examined when determining whether testimony not specified in the pretrial order should be admitted: prejudice or surprise in fact, ability to cure, disruption of the trial process, and bad faith or willfulness. 626 F.2d at 797 (quoting *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904-05 (3rd Cir. 1977)). The Court shall address each of these factors separately.

The first factor is prejudice or surprise in fact. In *Smith*, Dr. Freston's testimony was described by the plaintiff in a supplimental pretrial list of witnesses in exactly the same manner as two other experts previously identified by the plaintiff. Those two experts had previously been deposed by the defendant and neither indicated any knowledge of the "seat belt syndrome." Dr. Freston, however, when called to the stand as plaintiff's first witness, proceeded to testify that plaintiff's injuries were caused by and consistent with a defective seat belt; the "seat belt syndrome." The Tenth Circuit found that describing Dr. Freston's anticipated testimony in the same manner as the other two medical experts who professed no knowledge of "seat belt syndrome" had misled the

defendant into believing that Dr. Freston likewise had no knowledge of "seat belt syndrome." *Smith*, 626 F.2d, at 797. Texaco, on the other hand, has demonstrated no such misconception or surprise.

The second factor is the ability to cure. The Tenth Circuit emphasized that "[t]he challenged testimony [of Dr. Freston] provided crucial, non-cumulative evidence on the question of whether a *defective* seat belt aggravated or enhanced the plaintiff' injuries." *Smith*, 626 F.2d at 798 (emphasis in original). The testimony of which Texaco complains was cursory and cumulative and, in fact, was covered in much greater detail by other witnesses for Mason. Thus Texaco was prepared to counter this testimony, albeit Texaco may not have anticipated having to do so with some of Mason's experts. Texaco was not surprised by the substance of the testimony, only by the witness from which it came. Texaco was in a much better position to counter any unanticipated testimony that was the defendant in *Smith*.

Further, in *Smith*, Dr. Freston was scheduled to depart the day following the day he was called to the stand. The defendant had only eleven minutes to prepare for cross-examination and in which to respond to an issue they reasonably had anticipated would not be raised at trial. Texaco was repeatedly told by the Court that while the Court wished to accommodate the schedules of the experts, the Court would grant short recesses, even until the next morning if necessary, to allow preparation of an adequate response to any "surprise" testimony. Texaco's ability to cure any prejudice caused by the unanticipated testimony was not significantly impaired.

The third factor is disruption of the trial process. Proper response to the testimony of Dr. Freston in *Smith* would have required consultation with additional experts and perhaps the enlistment of new expert witnesses. *Smith*, 626 F.2d, at 799. Because the testimony in this case was cumulative, no additional experts were needed

in order to adequately respond. Instead, all that was necessary was enough time for Texaco's counsel to get articles or notes which were not expected to be necessary for the particular witness. Thus, no significant trial disruption was necessary to allow Texaco to adequately respond.

The final factor is bad faith or willfulness. The Court has been presented with nothing to indicate bad faith or willfulness on the part of Mason's counsel.

In summary, the factors in *Smith* which demonstrated sufficient prejudice so as to dictate a new trial in that case simply do not indicate sufficient prejudice to require a new trial in this case.

Texaco then asserts that the amount of actual damages awarded by the jury in this case is grossly excessive and unreasonable under the evidence. Texaco argues that the award of $9 million in actual damages was clearly the result of passion or prejudice. The Court disagrees.

An award of actual damages by a jury should not be overturned unless the award affirmatively appears to be the result of bias, prejudice, or passion. *White Motor Corp. v. Stewart*, 465 F.2d 1085, 1090 (10th Cir. 1972), *cert. denied* 409 U.S. 1061. Moreover, when the only support for the allegations of bias, prejudice, or passion is the size of the verdict itself, a new trial should not be ordered unless the amount of the verdict is so grossly excessive as to shock the conscience of the Court. *Rosen v. LTV Recreational Development, Inc.*, 569 F.2d 1117, 1123 (10th Cir. 1978); *Nye v. Fenton*, 496 F. Supp. 136, 138 (D.Kan. 1980).

The Court heard the testimony of the witnesses in this case on the extent of the injuries suffered by Otis Mason before his death and the injuries and loss to his family after his death. The Court will not recite the evidence admitted in this case concerning the pain and suffering undergone by a person dying from leukemia except to say

that a plethora of undisputed medical evidence indicated that this was one of the most excruciatingly painful ways of dying, and showed that because of a short remission, Mason in effect went through the experience twice before succumbing to death. Likewise, the unrebutted lay evidence of pain and suffering had a compelling poignancy. Suffice it to say that in light of the substantial evidence offered as to the amount of actual damages suffered, the verdict in this case, while generous and more than this Court would have assessed to this category of damages, is not so excessive as to shock the conscience of the Court.

Texaco also asserts that the Court improperly allowed Dr. Infante to testify as a rebuttal witness for Mason and unduly limited the scope of the surrebuttal of Dr. Cole for Texaco. This claim is wholly without merit.

The Court has great discretion is allowing and limiting the scope of rebuttal and surrebuttal evidence. *See Chatequgay Ore & Iron Co. v. Blake*, 144 U.S. 476, 485 (1892); *St. Paul Plow-Works v. Starling*, 140 U.S. 184, 196-97 (1891).

Numerous expert witnesses called by Texaco, including but not limited to Dr. LaBarthe, unleashed harsh criticism of the article by Dr. Infante entitled "Leukemia in Benzene Workers" published in *The Lancet* on July 9, 1977. Dr. Infante's testimony was offered for the sole purpose of rebutting the criticism voiced by Texaco's expert witnesses of the methods used by Dr. Infante in collecting and interpreting the data used as a basis for his article. Dr. Infante's testimony was limited to this single area. This is certainly proper rebuttal. The fact that Dr. Infante's testimony would have been admissible in Mason's case-in-chief does not remove it from the class of proper rebuttal evidence. See *Martin v. Weaver*, 666 F.2d 1013, 1020 (6th Cir. 1981); *Smith v. Conley*, 584 F.2d 844, 846 (8th Cir. 1978); *Weiss v. Chrysler Motor Corp.*, 515 F.2d 449, 457-58 (2d Cir. 1975).

Dr. Cole was offered as a surrebuttal witness by Texaco after Dr. Infante made what Texaco asserted was a gross misstatement concerning how to compute the probability that an individual contracted leukemia from benzene exposure rather than as a part of the normal incidence of leukemia in the general population if it is assumed or known that benzene exposure increases the risk of contracting leukemia by a given factor. This was the only new matter raised by Mason on rebuttal that had not been previously addressed during the lengthy presentation of Texaco's case-in-chief. The Court limited Dr. Cole's testimony so as to keep his testimony within the scope of proper surrebuttal.

Texaco lastly claims that misconduct by Mason's counsel deprived Texaco of a fair trial. This trial lasted fourteen weeks and was hotly contested its entire duration. Counsel on all sides vigorously and adamantly represented their clients' interests. The Court presided over the entire proceedings and strove diligently to prevent prejudicial matter from coming to the attention of the jury. As a matter of fact, during the course of the trial, counsel on both sides made some misstatements of potential prejudicial nature in the form of their questions. Concerning the question on deaths in the Ohio rubber industry, alleged to have resulted from benzene sold by Texaco, an objection was sustained to the inference, and it was stricken and the jury admonished to disregard it. The Court repeatedly admonished the jury during the course of the trial and in the final instructions that the statements of counsel were not evidence and were to be disregarded. The Court is convinced that the statements by counsel for Mason, of which Texaco complains, had no effect on the verdict in this case.

The Court finds the other arguments for a new trial made by Texaco are without merit and need not be addressed further. Furthermore, the Court finds that none of the errors asserted by Texaco, when considered indi-

vidually or in concert, are sufficient to justify a new trial in this case.

IT IS THEREFORE ORDERED that the motion for new trial by Mason is hereby denied.

IT IS FURTHER ORDERED that the motion by Texaco for judgment notwithstanding the verdict, or, in the alternative, for a new trial, is also hereby denied.

At Wichita, Kansas, this 2nd day of August, 1984.

/s/ Frank G. Theis
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Docket Number 78-1337

FRANK G. THEIS, SENIOR JUDGE

OTIS W. MASON

v.

TEXACO, INC.

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that answers to interrogatories in the special verdict form indicate an award of total actual damages against Texaco and actual or phantom parties under the Kansas Comparative Negligence statute in the sum of $9,000,000.00, and a verdict that defendant Texaco, Inc., was found to be 35% at fault in causation of said damages. The Court now applying the 35% against the total actual damages hereby enters judgment against defendant Texaco, Inc., in the amount of $3,150,000.00, plus interest in the amount of 10.10% as provided by law.

FURTHER ORDERED that in accordance with previous orders, all other defendants have been dismissed in this case.

APPROVED AS TO FORM:

/s/ Frank G. Theis
FRANK G. THEIS

/s/ ARTHUR G. JOHNSON
Clerk

By: /s/ R. Jones
Deputy Clerk

Date 1/6/84

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 90-3250
90-3278

DIANA L. MASON, Individually and as Administrator of the Estate of OTIS W. MASON, Deceased,
Plaintiff-Appellee,
v.

TEXACO, INC.,
Defendant-Appellant.

ORDER

Filed January 14, 1992

Before McKAY, Chief Judge, BARRETT, HOLLOWAY, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing with suggestion for rehearing en banc, filed in the captioned case. The court also has for consideration appellee's response to the petition, appellant's motion for leave to file a reply to the response and appellee's motion to strike appellant's motion.

Upon consideration whereof, appellant's motion to file a reply to appellee's response to the petition for rehearing is granted. The petition for rehearing is denied by the panel to whom the case was argued and submitted.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular

active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Seymour did not participate in the consideration of the suggestion for rehearing en banc.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX I

[Jury Interrogatories, Dated January 6, 1984]

VERDICT

We, the jury in the above entitled case, duly impaneled and sworn upon our oaths, answer the questions submitted to us as follows:

1. Do you find by a preponderance of the evidence that Otis Mason's leukemia was caused by his exposure to benzene?

Yes X No —

(If your answer to Question No. 1 is "No", do *not* answer any further questions and return to report this to the Court. If your answer is "Yes", then you must continue to Question No. 2.)

2. Do you find by a preponderance of the evidence that the benzene which caused Otis Mason's leukemia was produced by Texaco?

Yes X No —

(If your answer to Question No. 2 is "No", do *not* answer any further questions and return to report this to the Court. If your answer is "Yes", then you must continue to Question No. 3.)

3. Do you find by a preponderance of the evidence that benzene was considered to be carcinogenic—that is, cancer-causing—to a reasonable degree of probable certainty, according to the state of scientific knowledge as it existed at the time of Otis Mason's exposure, to the extent that Texaco either knew of such scientific knowledge or should reasonably have known of it?

Yes X No —

(If your answer to Question No. 3 is "No," do *not* answer any further questions and return to report this to the Court. If your answer is "Yes," then continue on to Question No. 4.)

4. Do you find by a preponderance of the evidence that the actions taken by Texaco were insufficient and inadequate to warn Texaco's immediate purchaser of the dangerous carcinogenic propensity of benzene?

Yes X No —

(If your answer to Question No. 4 is "No," do *not* answer any further questions and return to report this to the Court. If you answer is "Yes," then you must continue on to Question No. 5.)

5. Do you find by a preponderance of the evidence that Texaco did not take reasonable measures to determine that its immediate purchaser, Mellen, was capable of conveying adequate warning to others in the chain of distribution of benzene?

Yes X No —

(Regardless of your answer to Question No. 5, proceed on to Question No. 6.)

6. Do you find by a preponderance of the evidence that either Texaco's failure to adequately warn Mellen or to take reasonable measures to see that its purchaser Mellen was capable of passing on an adequate warning, as more fully stated in Questions No. 4 and 5 above, or both, was a direct cause of Mason's leukemia?

Yes X No —

(If your answer to Question No. 6 is "No," do *not* answer any further questions and return to report this to the Court. If your answer is "Yes," then you must continue on to Question No. 7.)

7. Considering all of the fault at one hundred percent, when percentage of the total fault of others than Texaco has been proved by a preponderance of the evidence by Texaco and what percentage is attributable to each of the persons listed below. If you cannot find as to any of these persons, excepting Texaco, that his or its fault as a

direct contributing cause to Mason's leukemia is more likely so than not so under the evidence, you cannot attribute any fault to such person.

Otis Mason	( )% to 100%)	3%
U.S. Coast Guard	(0% to 100%)	26%
Gerin Corp.	(0% to 100%)	25%
Dooner and Smith	(0% to 100%)	5%
Mellen Chemicals	(0% to 100%)	6%
Texaco, Inc.	(0% to 100%)	35%
	Total	100%

(If you find that Otis Mason was 50% or more at fault do *not* answer any further questions and return to report this to the Court. If you find that Otis Mason was less than 50% at fault, you must continue on to Questions No. 8, 9 and 10.)

8. Without considering the percentages of fault found in Question No. 7, enter the amount of actual damages, pecuniary and non-pecuniary, as defined in the Court's instructions, that you find were suffered by Diana Mason and the children of Otis Mason as a result of his death.

Pecuniary (no maximum or minimum)	$3,475,000.00
Non-pecuniary (25,000 maximum	$ 25,000.00
Total actual Damages	$3,500,000.00

(If you have answered Question No. 8, proceed to Question No. 9.)

9. Without considering the percentages of fault found in Question No. 7, enter the total amount of damages for personal injuries, as defined by the Court's instructions, that were suffered by Otis Mason before his death.

$5,500,000.00

(If you have answered Question No. 9, proceed to Question No. 10.)

10. Do you find by a preponderance of the evidence that an award of punitive damages against defendant Texaco, Inc. is appropriate, as defined in the Court's instructions?

Yes No X

(If your answer to Question No. 10 is "Yes", proceed to Question No. 11. If your answer is "No," please return to the courtroom.)

11. What amount of punitive damages do you award?

$ _____

/s/ Lee Darby
Foreman

1-06-84
Date

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 78-1337

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,
Plaintiff,

v.

TEXACO, INC., a corporation,
Defendant.

THE COURT'S INSTRUCTIONS

* * * *

INSTRUCTION NO. 36

If you find for actual damages for the plaintiff, you must then consider whether to award exemplary or punitive damages to the plaintiff. In any action like the one before you, the jury may give damages for the sake of example and by way of punishment, if the jury finds the defendant has been guilty of oppression, fraud, or malice, actual or presumed. These damages are called in legal parlance exemplary or punitive damages.

The basis for allowance of punitive damages rests upon the principle that they are allowed as a punishment to the offender for the general benefit of society, both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future.

Punitive damages are not limited to cases where there is direct evidence of fraud, malice or gross negligence. They may be allowed when there is evidence of such reck-

lessness and wanton disregard of another's rights that malice and evil intent will be inferred. If a defendant is grossly and wantonly reckless in exposing others to dangers without adequate warning of those dangers, the law holds him to have intended the natural consequences of his acts, and treats him as guilty of a willful wrong.

To constitute willful or wanton negligence sufficient to justify an award of punitive damages, it is not necessary that there exist ill will toward the person injured, or specific intent to inflict the injury. If an act that caused harm to Otis Mason was the result of, or accompanied with, such gross negligence or reckless disregard of another's rights, manifesting an indifference to the consequences of the act, so that malice may be inferred, then an award of punitive damages is appropriate.

If you find that the conduct of defendant Texaco, if any, that caused or contributed to cause Otis Mason's leukemia, fits within this definition, you may award punitive damages against Texaco. Any punitive damages that you award must bear some relationship to the injuries inflicted, but need not bear any relation to the amount of actual damages awarded.

In determining the amount of punitive damages, you should consider the nature, extent and enormity of the wrong, the intent with which it was committed, and all of the circumstances surrounding the defendant's act, including plaintiff's time and expense of litigation.

You may consider the financial worth of the defendant against whom such damages are awarded in determining the size of such an award that is proper under the facts of this case. That is, you may consider the wealth of defendant Texaco, Inc. in determining what amount of punitive damages, if you find them appropriate, is consistent with the general purpose of such an award in detering the defendant, and others like it, from committing similar acts in the future, and for punishment of the

defendant for such acts. However, it would be improper to base your award of punitive damages, if you so award, solely upon the wealth of the defendant Texaco, Inc. If you determine that punitive damages are appropriate in this case, you should return an award of punitive damages which is based upon reasoned consideration of the above factors.

INSTRUCTION NO. 37

Punitive damages, in the last analysis, involve the element of bad thought, lax conscience, or "don't care" attitude, as more fully explained in the exemplary damage instruction. Government regulations of a governmental agency on conduct in a given field, are to keep something in social bounds as determined by the people who constitute government at legislative or executive levels. As indicated in other instructions, these regulations are based on the government's views of the best scientific and technical knowledge available at the time of their issuance or promulgation. Thus, in a democracy such as ours where the government responds to citizens' desires through the elective process, such regulations therefore can be deemed to reflect a broad base of citizen approval and as such are entitled to a high degree of respect and belief. On the other hand, you, as jurors, and as fact finders in a trial in our judicial system, have the duty of finding truth under the evidence.

Thus, corporate conduct of compliance with these regulations is entitled to the strongest and probably conclusive consideration by a jury as negativing or proving lack of bad conduct necessary to base punitive damages, unless the total evidence convinces the jury that the regulations were not sound or true when measured by the weight of the available scientific knowledge, or that the conduct was actually in violation of the regulations, or that the person or corporation against whom a particular regulation was to apply, knew or should have known that it would not accomplish its intended purpose.

INSTRUCTION NO. 38

The Court has permitted plaintiff to introduce evidence in this case concerning the earnings and net worth of the defendant Texaco, Inc.

This evidence may be considered by you only if you first determine, under other instructions of the Court, that plaintiff is entitled to an award of punitive damages in this action.

In the event that you determine plaintiff is entitled to punitive damages, then in that instance, and in that instance only, you may proceed to consider evidence of defendant Texaco's earnings and net worth, insofar as such evidence may be pertinent to the amount of punitive damages which the jury deems to be appropriate under all of the circumstances.

You must not in any way consider such evidence in awarding the actual or compensatory damages.

APPENDIX K

[Excerpts from Closing Statement of Plaintiff's Counsel]

* * * *

[8460] * * * Small people have a difficult time with pursuing their rights against a corporation who is five times bigger than all the property in Sedgwick County, who makes three and a half million dollars a day after taxes because, can you imagine being in litigation, yea, over 10 years and it's not over, even if you return a verdict for the plaintiff in this case. * * *

* * * *

[8467] * * * You nine jurors sit here today in an unusual position because nine individuals from every walk of life who come in who to hear a case like that can show that we as individuals can change something that might dramatically affect the whole world, all of society, might change something. Usually it's your fighting city hall but I say to you, you have it within your power as you sit here in this case to change something that means a lot to society. The first decision of whether or not punitive damages may even be allowed is made by Judge Theis. We have to get over half of Mt. Everest over there. Very few times is there submitted to the jury a question of punitive damages where you have the right to affect public policy, public actions and society and the world in general. That doesn't happen very often. It has to be powerful evidence that will even allow the lawyers to get that case submitted to a jury panel where they will decide whether they ought to change them. * * *

* * * *

[8480] Next, a cause of action for punitive damages in the amount of eight million. I can tell you that again is up to you. If you allow punitive damages because you think it should be to accomplish the purpose of punitive damages in this case then you decide how much and I must say, I'm going to say to you, eight million is not

enough and I don't know what is enough. I have a fear of what's enough because if you are going to allow punitive damages it seems to me it has to accomplish the purpose for which the Court tells you you allow it and I can tell you this, your judgment is as good as anybody's and I don't know if anybody is any good on how much money does it take to set an example and prevent Texaco and other people from doing what they did if you make three and a half million after taxes; and I had to smile to myself. One juror said, I think the amount of a hundred million came up and he was eventually excused, if you will recall. Well, if someone asked me if I could give anyone a hundred million I think I would say I would have to—I don't see how but I wouldn't be thinking of a situation where you [8481] know if a person worked at a job and made a hundred thousand a year and you took 10 percent of their income you would be taking 10,000, if that was to punish them but if they make three and a half million a day, how do you stop them? Are they so big they can't be stopped? That's one problem you will have to wrestle with if you get to punitive damages. How do you keep someone who is making three and a half million a day after taxes? How do you keep them from continuing to do these things. I don't know. I don't know. I'm afraid it would take so much money that no one could allow it and I don't want you to, I mean that's a fear in the back of my mind because if you conclude, say it would be a hundred million dollars and that's less than, less than 30 days income for them, I don't know, it's too much, not asking you to do that but I don't know, what do you do with someone this big? They are so big they don't have to care. * * *

* * * *

[8497] * * * I mean one billion three hundred and four million a year, that's take home. That is a hundred and eight million a month. If you took away a month's profits after taxes, would that stop Texaco from doing this again, would it stop, and it's not just Texaco, other members of

the petroleum and chemical industry, it's to set an example so they won't do it either. Per week it's 25 million. Per day it's three and a half million, * * *

Now, I can only say to you that on this issue of punitive damages it's somewhat scarey to me. Of course, I was born and raised in Kansas. How do you talk but billions and hundreds of millions? It's beyond the ordinary person's comprehension, all of us, I know that, but I ask you to do this, you decide this case in accordance with the evidence and the instructions. I didn't have time, I run out of time and if you find we are entitled to recover you give a fair amount for all the elements of damages. Surely Mr. Mason's life and the loss [8498] to his family and his pain and suffering is worth eight or nine or $10,000,000. That's a couple of, that's two, two and a half days profits. You know, actually if you were to allow the profits that Texaco made while Butch was suffering from leukemia and dying a slow death for over two years and three months, they made close to four billion dollars. Those figures really don't mean anything because it just shows that I guess it should be interesting to see what you think the action could change something in this case. You have the power, with it you should use good judgment. * * *

[8499] On the other hand, if you do, if you do what I've suggested here and find that their warnings were inadequate, that they caused this man to die for no reason and that other people were and still are dying because it's not really known that you shouldn't use benzene for a solvent, you didn't know it three months ago, this could happen to any member of the public by using a paint thinner or anything else, you didn't know. * * *

* * * *

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No. 91-1430

In The

Supreme Court of the United States

October Term, 1991

TEXACO INC.,

Petitioner,

v.

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the award of punitive damages herein comport with due process when the remittitur of $12.5 million by the Tenth Circuit Court of Appeals, coupled with detailed jury instructions and comprehensive post-trial review by the District Court, satisfied the guidelines enunciated by this Court in *Haslip*?

2. Did the District Court and the Tenth Circuit Court of Appeals properly find that a general reversal of judgment and remand for new trial by an appellate court renders the first jury's verdict null and void in its entirety and permits all factual issues to be resubmitted to the jury upon retrial?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Respondent states that the only interested persons in this proceeding are those persons listed as parties to these proceedings, their attorneys, and the entities identified by the Petitioner in its Rule 29.1 Statement in its Petition for Writ of Certiorari.

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No. 91-1430

In The

Supreme Court of the United States

October Term, 1991

TEXACO INC.,

Petitioner,

v.

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This Petition for Writ of Certiorari follows the unsuccessful appeal of Petitioner Texaco of the second jury verdict rendered against it in this fourteen year litigation. Respondent brought this products liability action as a result of the death of her husband, Otis Mason, from benzene exposure during his employment as a Coast Guard instructor.

Texaco was a purveyor of benzene in bulk and introduced the chemical into the chain of distribution, ultimately leading to Otis Mason's fatal exposure in 1974 and

death by acute myelocytic leukemia, a cancer affecting the bone marrow, in 1979. The product information provided by Texaco to its immediate purchasers contained no warnings that benzene could cause cancer or leukemia. Although Texaco had known for decades prior to Mason's exposure that benzene causes cancer at even minuscule exposures, it did not provide adequate warnings of the risk until the very eve of the second trial of this case in September, 1989.

Texaco adopted the position up to and throughout trial that any downline purchaser of its benzene could "look it up themselves" and it was therefore under no duty to disclose its knowledge of the risk of cancer from benzene exposure. No purchaser in the chain of distribution between Texaco and Otis Mason knew, or possessed the expertise to know, of the cancer hazards of benzene.

The first trial of this case resulted in a judgment against Texaco for $9 million in compensatory damages. On appeal, the Tenth Circuit Court of Appeals reversed the judgment against Texaco and issued a general remand for new trial on the ground that the District Court had erred in its jury instructions.

Texaco's position upon retrial was that it should be permitted to reopen all the evidence, add new witnesses and theories of defense, add new phantom parties for comparison of fault and obtain retrial of all damages issues, but that Respondent, Diana L. Mason, was not entitled to the same benefit and was bound by the first jury's finding that punitive damages were not warranted.

The issue of the scope of retrial following a general remand by the Tenth Circuit was exhaustively briefed by

both parties to the District Court which denied Petitioner's Motion to Exclude the Issue of Punitive Damages and permitted a new trial on all issues pursuant to the mandate of the Court of Appeals. Texaco thereupon petitioned the Tenth Circuit Court of Appeals for a Writ of Mandamus to prevent submission of punitive damages to the jury in the second trial. The Tenth Circuit denied the Petition on the ground that Petitioner had failed to show a right to relief.

The jury in the second trial once again returned a verdict against Texaco and judgment was entered for $9.025 million in compensatory damages and $25 million in punitive damages. Texaco then brought a Motion for Judgment Notwithstanding the Verdict or New Trial wherein it raised for the first time during this litigation the issue of the constitutionality of the punitive damage award.[1] Following the District Court's denial of Texaco's post-trial motions, Texaco again appealed. The Tenth Circuit Court of Appeals affirmed the judgment on the condition of acceptance of a remittitur of fifty percent of the punitive damage award by Diana Mason. Mrs. Mason has accepted the remittitur of punitive damages from $25 million to $12.5 million in the interest of concluding this lengthy and complex litigation.

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[1] At no time prior to the jury retiring to determine its verdict, did Texaco raise an objection to the punitive damage instructions on the grounds that they provided inadequate guidance to the jury to satisfy due process requirements. Based on Texaco's failure to raise a timely objection, the District Court declined to pass on the petitioner's constitutional challenge to punitive damages pursuant to *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. at 1651 (1988). See Petitioner's Appendix 120-21a.

The first question now presented by Petitioner Texaco therefore does not accurately represent the state of the case before this Court. The issue is not whether the jury's award of $25 million in punitive damages was violative of the Due Process Clause but whether the process for assessment and review of punitive damages as a whole, including the remittitur of $12.5 million of the punitive award, satisfies the guidelines set forth by this Court in its recent decision of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991).

The second question presented by the Petitioner is the scope of retrial following general remand by the Tenth Circuit Court of Appeals. This issue has been raised, briefed, and argued in depth at every stage of this proceeding since reversal of the original judgment. Upon remand to the District Court, the Tenth Circuit directed a new trial as to all "fact-found" issues. As a result of the general remand and at Texaco's insistence, this case was truly tried anew. Texaco derived enormous benefit from the District Court's adherence to the general remand. There was no substantial similarity in the evidence presented at the first and second trial. The retrial of liability in this case produced overwhelming new evidence of conduct warranting the award of punitive damages. Both the District Court and the Tenth Circuit Court of Appeals recognized that a punitive damage claim is not an independent cause of action separate from the balance of a plaintiff's case but is part and parcel of a liability determination. Pet. App. 14a. The entire issue of liability was subject to retrial upon the general remand. Based on the overwhelming evidence that Texaco's negligent conduct was gross, willful, wanton or malicious, the Tenth Circuit

held that the District Court did not err in permitting retrial of punitive damages.

Texaco contends that "the claims, the jury instructions on punitive damages, the judge, the lawyers, and the courtroom were the same in both trials" and therefore, apparently, the jury's verdict should have been the same on punitive damages. However, the evidence determines the basis for a jury's verdict not the room in which it is presented or the persons providing it. The District Court reviewed the punitive award and found it consistent with Kansas law and the evidence based on factors consistent with this Court's appraisal of due process parameters. The Tenth Circuit Court of Appeals reviewed the punitive damages award in light of this Court's decision in *Haslip* and similarly found the standards for assessment and review of punitive damages in the present case imposed a sufficiently definite and meaningful constraint on the discretion of the jury in awarding punitive damages. The Tenth Circuit found the award was not the result of passion, prejudice or bias, but nevertheless deemed it excessive and ordered a remittitur of one-half to $12,500,000.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

Certiorari should be denied in this case on the following grounds: 1) Petitioner failed to present its due process argument in a timely manner, as required by consistently applied federal practice; 2) the decision below is consistent with the decisions of this Court and

the other circuit courts of appeal; and 3) there is no urgent reason, in the context of this case, for the Court to intervene.

This case offers no new issues to review beyond those persistently brought before this Court in recent years by parties challenging punitive damage awards on due process grounds. This Court addressed the due process challenge to punitive damages no more than a year ago in the decision of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). Despite Petitioner's protestations that *Haslip* has spawned in its wake unacceptable conflict in the circuit courts and widely disparate treatment in district courts, a reasoned evaluation of post-*Haslip* decisions reveals an evolving body of law that has at its heart a balanced appreciation and application of the tenets and guidelines enunciated by this Court in the *Haslip* decision.

The Petitioner advances the view that *Haslip* established a new federal common-law of punitive damages, one that imposes on all the States the requirement that they adopt Alabama state law as their own or stand in violation of the Due Process Clause.[2]

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[2] This anomalous view has unfortunately been given some passing support in at least one lower court which Petitioner relies on for its argument of circuit conflict. *See Fleming Landfill, Inc. v. Garnes*, 111 S. Ct. 2882 (1991) *on remand*, 60 U.S.L.W. 2417, 1991 WL 258826. However, the *Fleming* court cited with approval to Professor Schwartz who has stated that " 'The [U.S. Supreme Court has] vested responsibility in state courts to develop fair and reasonable rules and guidelines. V. Schwartz, L. Magarian, "Forming Guidelines Out of Vagueness; How State Courts Can Implement Haslip.' " Slip Op. at p. 9.

Such a view flies in the face of both the language and stated intent of this Court's opinion, as well as long-established tenets of Federalism. As all the Justices in *Haslip* acknowledged, concurring and dissenting alike, concerns of Federalism and judicial restraint counsel that this Court not dictate to the States what method and manner to adopt in order to make state law consistent with the due process objectives of giving juries appropriate guidance and providing adequate post-trial review of punitive awards. See e.g. Justice O'Connor's dissenting opinion in *Haslip*, 111 S. Ct. at 1064.

The post-*Haslip* decisions conform both to the spirit of the constraints recognized as necessary by this Court and with the recognized principles of Federalism that inform those decisions. The decision of the Tenth Circuit Court of Appeals in this case comports not only with this Court's decisions but the law of Kansas as well. Unlike the punitive damages schemes employed by many states, the law of Kansas provides specific and sound guidance to juries in making their determinations of whether punitive damages are warranted. The trial and appellate courts are thus relieved of the necessity of correcting unbridled jury discretion in rigorous post-hoc reviews in which the appellate court is called upon to substitute its own judgment for that of the jury – a situation recognized by the Fourth Circuit as implicating Seventh Amendment concerns in the context of federal diversity cases.

It is true that *Haslip* has, by necessity, been addressed in cases involving punitive damages arising since the date of that decision. This fact, however, does not necessitate a leap to the blind conclusion that the *Haslip* decision

has generated a miasma of conflict which requires resolution by this Court. The decisions composing the post-*Haslip* body of law on punitive damages offer a variety of interpretations and solutions to the issues addressed by this Court in *Haslip*. The Petitioner espouses the view that the circuit courts of appeal and state courts are mired in irreconcilable conflict on the import and interpretation of *Haslip*. On the contrary, these decisions give substance to Justice Kennedy's observation that "nonuniformity cannot be equated with constitutional infirmity." *Haslip*, 111 S. Ct. at 1055.

The abolition of state common-law in this area is neither necessary nor desirable despite Petitioner's invitation to this Court to invoke a new federal common-law of punitive damages. (An invitation declined by this Court in its earlier decision of *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909, 2922 (1989)).

This case is not the appropriate vehicle for further explication of the principles enunciated in the *Haslip* opinion, even if such explication were deemed necessary. The law of Kansas, as embodied in the instructions to the jury in this case and applied by the District Court and the Tenth Circuit in their review of the jury's award, clearly conforms to the due process guidelines expressed by this Court in *Haslip* and found present in the law of Alabama.

The Petitioner makes much of the fact that the second jury in this case found the evidence to warrant an award of punitive damages while an earlier jury did not. This fact merely exemplifies the existence of disparate evidence between the two trials not disparate outcomes. One

of the hazards of retrial, as all must well be aware, is the opportunity to increase and enhance the evidence in support of one's case, an opportunity equally enjoyed by both parties. Upon retrial, the evidence of the flagrant disregard of the risks to which Texaco exposed the public was overwhelming – evidence the jury chose not to disregard and the courts found wholly competent on appeal. As a result, Texaco was assessed punitive damages equal to its net profits for less than a week, a figure that was reduced on remittitur to a sum less than 1/6th of 1% of Texaco's net worth.

The other question presented by the Petitioner to this Court is similarly undeserving of this Court's attention. Despite Petitioner's assertion of a conflict between the Tenth Circuit and the Eighth and Fourth Circuits on the scope of retrial upon a general remand, the law of these circuits adheres to the principle long-held by this Court that "reversal of a judgment and remand for a new trial places the parties in the same position, insofar as relief is concerned, as if the case had never been tried." *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991) citing *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947). The District Court in this case had no more power to grant preclusive effect to the first jury's verdict on punitive damages than it did concerning the first jury's award of compensatory damages. The Tenth Circuit's affirmance of the district court's retrial of all damages and liability issues should be undisturbed.

II. KANSAS LAW ON PUNITIVE DAMAGES AS APPLIED IN THIS CASE COMPORTS WITH DUE PROCESS GUIDELINES

As observed by the Petitioner, the analysis of whether the assessment and review of punitive damages in this case comports with due process must be guided by this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S. Ct. 1032 (1991). In the scant year since this Court's pronouncement of due process constraints on "unlimited jury discretion," several lower courts have had the opportunity to apply the reasoning and holding of *Haslip* to the cases before them. In particular, the decisions rendered in the cases remanded by this Court to the circuits for consideration in light of *Haslip* amply demonstrate that the circuits are astute, creative and balanced in addressing due process concerns and applying *Haslip* to state common law. Rather than a morass of conflicting holdings, these cases constitute an evolving, yet cohesive, approach to ensuring that punitive awards "do not exceed an amount that will accomplish society's goals of punishment and deterrence." *Haslip,* at 1045.

The Petitioner asserts that the circuit courts have taken three different approaches to *Haslip.* In reality, the circuit courts have displayed uncommon uniformity in applying *Haslip* to the wide variety of state law schemes and factual scenarios presented to them by the cases reviewed. The approach is by a case by case evaluation of the law of each forum to determine whether each punitive damage scheme imposes "definite and meaningful constraint on the discretion of the fact-finders in awarding punitive damages." *Id.*

The "conflict" perceived by the Petitioner as requiring imposition of a uniform federal common-law standard by this Court is in reality the recognition and accommodation of the common-law of the States sought to be preserved by our doctrine of Federalism. In promoting its argument that *Haslip* has imposed on the circuits and the States a requirement that every forum must adopt Alabama's scheme of post-trial review, the Petitioner constructs a premise that the circuit court decisions can be segregated into three opposing "camps". The Petitioner then concludes that the only circuits that have appropriately applied *Haslip* are the Fourth, Eighth and Eleventh Circuits since these circuits purportedly hold that the only punitive damage schemes that satisfy due process are those that apply a rigorous post-verdict review employing the Alabama *Green Oil* criteria. (These criteria were recited in *Haslip,* 111 S. Ct. at 1045.) Petitioner's argument must fail as both its premise and conclusion are fallacious.

The Petitioner identifies the Tenth Circuit's decision in this case, as well as the Fifth Circuit's Decision in *Eichenseer v. Reserve Life Ins. Co.,* 934 F.2d 1377 (5th Cir. 1991), as forming the "camp" of cases that allegedly "ignore *Haslip* by suggesting that the deferential post-trial review for excessiveness that 'shocks the conscience' satisfies *Haslip* and due process." This premise is a gross distortion of both of these cases.

The factors identified in *Haslip* as necessary to satisfy due process concerns were considered and applied by the jury, the trial court, and the appellate court in this case.

The jury was instructed that it was not required to but may award punitive damages if appropriate. In determining whether to make a punitive award, and in what amount, the jury was further instructed to base its decision on the reasonable consideration of the following factors: 1) the purpose of punitive damages is to punish and deter like offenses by the defendant and as a warning and example to others; 2) the conduct of defendant must have possessed elements of oppression, fraud, or malice; 3) the award must bear a relationship to the injuries inflicted; 4) the nature, extent and enormity of the wrong; 5) the intent with which the acts were committed; 6) all circumstances surrounding defendant's acts; 7) the plaintiff's time and expense of litigation; 8) the defendant's financial worth may only be considered in determining what amount, if any, is consistent with the purpose of deterring defendant and others from similar acts in the future and for punishment of defendant, but it is improper to base an award solely on the wealth of a defendant; and, 9) the defendant's compliance with regulations was to be entitled to "probably conclusive" consideration as proving the lack of bad conduct necessary for punitive damages. See Pet. App. 174a-178a. As can be clearly seen, the factors identified by this Court in *Haslip* as appropriate for consideration were contained in the jury's instructions in this case.

Next, the district court conducted a post-verdict review of the punitive damage award which, pursuant to Kansas law, included assessment of the following factors: 1) the award's relationship to the actual damages sustained; 2) the actual damages awarded; 3) the circumstances of the case (i.e., the nature, extent, and enormity

of the wrong); 4) the intent of the party committing the wrong; 5) the relative positions of the plaintiff and defendant; 6) the defendant's net worth; and 7) plaintiff's probable litigation expenses. *See Folks v. Kansas Power & Light Co.*, 243 Kan. 57, 78, 55 P.2d 1319 (1988). In addition, the trial court analyzed the deterrent effect of the award and the ratio that the punitive damage award bore to compensatory damages. *See Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1515-17 (D. Kan. 1990).

As this court has repeatedly stated, the purpose and goal of punitive damages is punishment and deterrence and, to that end, a defendant's financial condition and wealth is a factor that must be considered. The jury's award of punitive damages in this case was far below the norm in its proportionality to Texaco's financial condition. After remittitur, the award was grossly disproportionate to the ratio of damages to financial worth upheld by most appellate courts as well as this Court in *Haslip*. Indeed, the ratio of compensatory to punitive damages in this case was 1 to 1.3. In light of the net worth of Texaco of $8.105 billion and annual net earnings of $1.304 billion, the typical ratio of such awards of one percent of net worth would have warranted a punitive award of around $81 million.[3] By comparison, the jury award of $25 million in punitive damages was modest indeed.

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[3] In rejecting defendant Texaco's argument that the verdict of $25 Million was excessive, the District Court stated that it "must also consider this award in light of the underlying punishment and deterrent purposes of punitive damages." It then referred to the recent survey of punitive awards by the Seventh Circuit wherein a typical ratio of 1% of net worth was found. *See Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 fn.3, (7th Cir. 1990), Pet. App. 117a.

Despite the satisfaction of all the criteria necessary to ensure a fair and reasonable award by both the jury and trial court, the Tenth Circuit Court of Appeals further reviewed the award for excessiveness. The Tenth Circuit concurred with the District Court's conclusion "that there was sufficient evidence in this case to justify the jury in finding that Texaco 'knowingly embarked upon a course of conduct dangerous to the public, motivated by private gain.' " Pet. App. 28a. Although the Tenth Circuit agreed that the award was not motivated by passion, prejudice or bias, it took the view that "the award was so excessive as to shock our judicial conscience." Pet. App. 29a. The Tenth Circuit applied none of the "Green Oil" factors as a rationale for its remittitur of 50% of the punitive award and apparently based its decision only on the fact that the award was a "staggering sum." Ironically, reference to *Haslip* guidelines would dictate affirmation of the award, not its remittitur.

The foregoing synopsis of the scheme for assessing and reviewing punitive damages clearly reflects that all constraints necessary to satisfy due process were applied and operated efficiently in this case. In *Haslip*, this Court issued no requirement that only post-verdict review employing the Alabama model be utilized in every state and district. Several courts have recognized the anomaly created by such a scheme to be that juries are given no guidance and appellate courts must then assume the role of fact-finders and "correctors" of the results of such standardless discretion. As observed by Justice O'Connor in her dissenting opinion in *Haslip*, post-hoc review does not cure standardless discretion – an observation shared

by several courts which have reasoned that jury instructions should be crafted to reflect due process guidelines, such as they were in this case, rather than relying on judicial review after trial to cure the aberrations of unguided discretion. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109 (4th Cir. 1991). *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991). *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1351 (4th Cir. 1991).

It bears repeating that *Haslip* did not purport to establish a federal common-law standard identical to the Alabama procedures.

> It needs emphasizing that *Haslip* did not hold that the procedures that it approved, devices that the Alabama courts had developed over the years, are the minimum ones that the due process clause requires. Rather, the Court was careful to say simply that the Alabama procedure is constitutional because it 'ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.' *Haslip*, 111 S. Ct. at 1044.

Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342, *on remand*, 779 F. Supp. 994, 996 (N.D. Ark. 1991).

This Court has recently declined to review the constitutionality of the Kansas standards pursuant to the same arguments presented in *Haslip* and by Petitioner herein. *OGilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988). This Court similarly declined to review a Kansas jury award of punitive damages for the same type of corporate conduct committed by Texaco in this case. *Woodersen v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert.*

denied, 469 U.S. 965 (1984). More significantly, the trial court applied the same elements of review as approved by this Court in *Haslip* and which far exceeded the review standards employed in other states affirmed by the circuit courts. Indeed, the Fourth Circuit case relied on by Petitioner, *Johnson v. Hugo's Skateway,* 949 F.2d 1338 (1991), noted

> Although there is some uncertainty as to whether, to meet constitutional muster, each and every *Haslip* factor must be satisfied, we find ourselves in accord with the analysis that the Fifth Circuit conducted in its recent opinion in *Eichenseer v. Reserved Life Ins. Co.,* 934 F.2d 1377 (5th Cir.1991), finding sufficient evidence in the record to satisfy three of the seven *Haslip* factors and thus finding that 'the record in th[e] case provide[d] sufficient support for an award of punitive damages.'

949 F.2d at 1351.[4]

The only "Green Oil" factors upon which the jury was not instructed were criminal sanctions against the defendant, a factor not relevant to the present case, and

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[4] Petitioner's argument that the Fourth and Fifth Circuits are in conflict on the application of *Haslip* is therefore without merit. The *Eichenseer* decision (applying Mississippi law) has been cited with approval by not only the Fourth Circuit but the Fifth Circuit applying Texas law in *Glasscock v. Armstrong Cork Co.,* 946 F.2d 1085, 1988 (5th Cir.1991), by the Supreme Court of Appeals of W. Virginia in *Fleming Landfill Inc. v. Garnes,* 111 S. Ct. 2882 (1991) *on remand,* 60 U.S.L.W. 2417, and its reasoning echoed by the Supreme Court of Georgia in *Hospital Authority v. Jones,* 409 S.E.2d 501 (Ga.1991) and the District Court for Arkansas in the Eighth Circuit in *Robertson Oil Co., Inc. v. Phillips Petroleum Co.,* 930 F.2d 1342, *on remand,* 779 F. Supp. 994 (1991).

the profitability of the wrongful conduct. Texaco asserts that *Haslip* requires that a jury be given evidence of the profits derived from misconduct. This argument is without merit. Alabama law *prohibits* the introduction of any evidence of wealth or profits to the jury. This Court has not held that the profitability of misconduct, rather than net worth or profits as a whole, must be considered to satisfy due process. It certainly did not so state in *Haslip*. Rather, the Court stated that due process requires that the standards imposed must "provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." 111 S. Ct. at 1045.

The standards for imposing and reviewing punitive damages are uniquely a matter of state law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). See also *Haslip* at 1043. This Court has previously declined to establish on its own a federal common-law standard and has abstained from such a course "because 'these are matters of state, and not federal, common law,' thereby suggesting that the State courts were competent to devise such a standard to complement, or gratify, due process limitations." *Alexander v. Evander*, 596 A.2d 687, 703 (Md. App. 1991), citing *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909 (1989). It should not now embark on an unprecedented intrusion on state sovereignty merely on the unsubstantiated suggestion that conflict between the circuits exists. Even were that the case, and the opinions cited by Petitioner certainly do not bear that out, no conflict exists between the Due Process Clause and the law applied in the present case.

Petitioner's primary complaint is the standards of review it alleges were used by the trial court and the Tenth Circuit of "excessiveness," "passion, prejudice, or bias" and "shocks the judicial conscience." As was detailed above, the Petitioner grossly misstates the scope of the post-trial review performed in this case. The District Court reiterated in detail how the facts of this case met the seven criteria required under Kansas law – the enormity of the wrong was revealed by the nature of the potential injury as well as the number of persons who were endangered by Texaco's conduct, the ratio of actual to punitive damages was less than 3 to 1, the injury suffered was an invariably fatal disease, Texaco knowingly risked injury to anyone of the general population who happened to be exposed to its benzene, Texaco's intent in marketing benzene without sharing its information with its purchasers permitted the inference of profit-motivated conduct, there was nearly complete dependence by purchasers on Texaco to supply information that only it actually possessed, and the jury's punitive award (before remittitur) was less than 2% of annual net worth. Pet. App. 116a-117a. The Tenth Circuit's review under the "shock the conscience" test does not render the significant constraints on the jury's discretion by the trial court's review and by the jury instructions a nullity.

The circuit courts of appeal are required to review the district court's ruling on a Rule 59 motion under an abuse-of-discretion standard. *Browning-Ferris*, 492 U.S. 257, 279. It cannot substitute new findings of fact for those of the jury. The fact-finding function is reserved to

juries alone. Fed.R.Civ.P. 38. Kansas law also allocates damage issues to juries and is constitutionally free to do so. This Court has heretofore consistently held that the federal system assigns the decisions of disputed questions of fact to the jury "under the influence – if not the command – of the Seventh Amendment . . . " *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 (1958). The restraint placed on federal courts by the Seventh Amendment in conducting post-verdict evidentiary hearings to review a punitive award is a fact recognized at least by the Fourth Circuit.[5]

The Petitioner contends that the Fifth and Tenth Circuit have both misinterpreted *Haslip* as requiring only some procedural assurance that the award is not a mere whim or impulse. This contention is totally without foundation by reference to the cases at issue. As is abundantly

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[5] In *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), the court held that the "legitimizing constraints provided by the quasi *de novo* review process practiced under Alabama state law cannot be applied by federal courts" and the instructions to the jury must contain the due process constraints on discretion necessary to meet the standards set down in *Haslip*. The reasoning that courts should not act as correctors of insufficient jury instruction has been approved or adopted by several other courts as well. *See Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991). *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991). The use of the shock the conscience and abuse of discretion standards by federal courts has not been abolished by *Haslip*. As demonstrated by this case as well, the standard "is not nearly so vague, elastic, and subjectively visceral" as Petitioner urges. *See Robertson Oil*, 779 F. Supp. at 996. *See also Hospital Authority v. Jones*, 409 S.E. 2d 501 (Ga. 1991); *Eichenseer*, 934 F.2d 1377 (5th Cir. 1991). *Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991).

demonstrated above, the full panoply of constraints were brought to bear on the jury's discretion in the case at bar. In *Eichenseer,* the Fifth Circuit did not hold that the only restraint on a jury's discretion was some amorphous reference to "reasonableness." Quite to the contrary, the Fifth Circuit upheld this Court's approval of the Alabama standards, but recognized if the standards were applied at the level of jury instructions, post-hoc correction would not be required and a less rigorous post-verdict review was constitutionally permissible.

> Again, [defendant] misunderstands the fact intensive nature of the due process analysis articulated in *Haslip*. The fact that the Mississippi appellate courts apply a deferential standard of review might be a significant factor in a case, for example, in which the trial court did not instruct the jury concerning the appropriate criteria for assessing an award of punitive damages. In such a case, the deferential standard of review might not act as an adequate check on the discretion that the jury would exercise in assessing damages. In the instant case, however, other procedural safeguards have controlled the discretion of the fact-finder. The district court completed a rigorous examination of the appropriateness of the punitive damages it imposed against Reserve Life, and in fact, the court applied many of the substantive standards that the Supreme Court approved in its review of the Alabama procedural process in *Haslip*: the relationship between the punitive damages award and the harm that occurred, the reprehensibility of the defendant's conduct, the 'financial position' of the defendant, the costs of litigation, etc. *Haslip,* 111 S. Ct. at 1045.

Eichenseer, 934 F.2d at 1386.

Petitioner contends that the Fourth, Eighth, and Eleventh Circuit authority stands in sharp contrast to the present case and to *Eichenseer*. However, as noted above, both the Fourth and Eighth Circuits have cited *Eichenseer* with approval.[6] The Eleventh Circuit decision in *American Employers Insurance Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), does not conflict with *Eichenseer*. Rather, the court in that case merely determined, consistent with the reasoning in *Eichenseer*, that inadequate jury instructions which pose no restraint on the fact finder's discretion require a more rigorous post-verdict review consistent with *Haslip*.[7]

The petitioner assumes that under a *Haslip* post-verdict review in the Fourth and Eighth Circuits, the awards "certainly would have been struck down." Reality must intrude. After reconsideration in light of *Haslip*, the Eighth Circuit has affirmed the jury's award in *Robertson Oil*. The court in *Hugo's Skateway* has not as of this

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[6] It is anomalous that Petitioner relies heavily on *Hugo's Skateway* as an exemplar of proper standards for establishing a punitive damages scheme. The court therein believed that federal courts were compelled to apply state law even if constitutionally deficient and to employ jury instructions applying inadequate guidelines, but must then correct the deficiencies on appellate review by applying Alabama post-verdict review procedures. *See, e.g.* 949 F.2d 1338, at 1351. Such a squandering of appellate resources when the goal is to provide sufficient guidance to the fact finder is indefensible under the authority of *Haslip*.

[7] The jury instructions at issue in *American Employers* merely stated the purpose of punitive damages and told the jury there were "no rules of thumb." 931 F.2d at 1458. The court therefore remanded to the district court for the court to assess if the award satisfied the *Green Oil* factors.

writing rendered an opinion as to whether the jury award in that case passes muster, although the circuit court certainly acknowledged the possibility that the award satisfied *Haslip*. 949 F.2d at 1352.

Finally, the Petitioner identifies but two alleged deficiencies in the instructions given the jury in the present case – that the jury was not given a precise range of punitive damages to award or a mathematical ratio to apply between compensatory and punitive damages. It suffices to say that Kansas law, as well as the law of many other states, does not require precise ratios of proportionality or establish a mathematical range of amounts that will serve to punish and deter. Each defendant must be assessed individually – a tenet apparently accepted by the Petitioner due to its approval of the *Mattison* reversal of an award for failing to take into account a defendant's poverty. *See, e.g. Southern Life & Health Ins. Co. v. Turner*, 111 S. Ct. 1678, *on remand*, 586 So.2d 854 (1991); *Robertson Oil*, 779 F. Supp. at 997 (ratio of punitive to compensatory damages of 10 to 1 did not of itself suggest excessiveness, especially in light of net worth of two billion dollars); *Glasscock v. Armstrong Cork*, 946 F.2d at 1095 (proportionality requirement is "simply a tool to help Texas courts determine when an exemplary damage award is the product of the jury's passion rather than its reason.")

This Court has certainly acknowledged that punitive damages address the enormity of the defendant's wrong "rather than the measure of compensation to the plaintiff". *Haslip* at 1042, citing *Day v. Woodworth*, 13 How. 363, 14 L.Ed. 181 (1852). In any case, a strict mathematical formula or range for setting punitive awards would defeat their very purpose of punishment and deterrence.

As Blackstone aptly observed "what is ruin to one man's fortune, may be a matter of indifference to another's." 4 W.Blackstone, Commentaries on the Law of England, *377-78 (1768).

Texaco argued that because benzene comprises only a small portion of its entire sales, benzene profits were a more appropriate measure for punitive damages. As pointed out by the trial court, under Kansas law, the amount of profit from wrongdoing is not the ceiling of punitive damage liability. *See Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987). "Otherwise, a manufacturer could continue to 'gamble' with low revenue, 'high risk' products, secure in the knowledge that any future punitive liability could always be mitigated by a compartmentalization of profits." *Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1504 (D.Kan.1990), Pet. App. 91a. Evidence of net worth or financial condition as a whole is similarly the standard in several other jurisdictions. *See, e.g. George v. International Soc'y for Krishna Consciousness*, 111 S. Ct. 1299 (1991), *on remand*, 4 Cap.Rptr.2d 473 (1992) (judgment reversed because no evidence introduced on financial status of defendant). Ironically, the Fourth Circuit, one of the circuits Texaco contends appropriately applies the *Haslip* guidelines, has reversed a punitive damage award not because the profits from the misconduct did not warrant the award but because the defendant's impoverished overall financial status was not considered. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991).

The decision of this Court in *Haslip* was case specific. The Court found "[w]e need not, and indeed we cannot,

draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 111 S. Ct. at 1043. Nevertheless, the Petitioner asks this Court to reconsider its *Haslip* decision and create federal common law dictating to the States a substantive law of punitive damages, including a state's allocation of judiciary functions between judge and jury, by requiring all states to adopt Alabama law wherein post-trial review of awards substitutes judicial fact-finding for that of the jury. Respondent respectfully requests that the Court once again decline this invitation.

III. THE TENTH CIRCUIT'S RULING ON THE SCOPE OF NEW TRIAL FOLLOWING GENERAL REMAND IS IN ACCORD WITH SETTLED FEDERAL LAW AND NO CONFLICT AMONG THE CIRCUITS EXISTS ON THIS ISSUE WARRANTING RESOLUTION BY THIS COURT

The Petitioner once again asserts a conflict among the circuits requiring this Court's intervention. However, the asserted conflict arises solely from Petitioner's interpretation of various circuit decisions it cites in support of its premise that the courts below erred in allowing all factual issues to be retried after the general remand by the Tenth Circuit. It is undisputed that an appellate court cannot grant relief not obtained at the district court without a cross-appeal. This tenet is the foundation for the eloquent reasoning of Justices Cardozo and Friendly cited by the Petitioner. However, this rule addresses the scope of appellate review, not the scope of new trial upon reversal of a judgment and remand for new trial. See *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185

(1937) (findings may not be revised by an appellate court as being against the weight of the evidence at the instance of an appellee who has not taken a cross-appeal).

The scope of appellate relief is not at issue in this case. Rather, the Tenth Circuit adhered to the widely adopted rule that upon reversal of a judgment and a general remand "the first verdict bec[omes] null and void in its entirety." *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991). In affirming the district court's adherence to the principle that "when a remand is general . . . the district court is free to decide anything not foreclosed by the mandate," the Tenth Circuit properly observed that the law of the case doctrine is solely a rule of practice and not a limit on the power of the court. See *Hicks v. Gates Rubber Co.*, 928 F.2d 966 (10th Cir. 1991). The rule has likewise long been applied by this Court. See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S. Ct. 777, 780 (1939). See also 1B *Moore's Federal Practice*, Paragraphs 0.404[4.3] at 131 and 0.404[10] at 172-74 (2d ed. 1988).

The Petitioner concedes that the Tenth Circuit's ruling in this case is wholly consistent with the decisions of the Seventh Circuit and the Federal Circuit. Further, the above discussion demonstrates that the law of these three circuits are also consistent with the precedent of this Court. As the following review of the cases cited by Petitioner as conflicting with the above authority reveals, the only conflict that exists among these decisions are on their facts and not in the law adopted and applied to them.

Petitioner has repeatedly relied on the authority of *Arnold v. Eastern Air Lines*, 681 F.2d 186 (4th Cir. 1982),

cert. denied, 460 U.S. 1102 (1983) for its argument that the Tenth Circuit could not remand the case to the District Court for new trial on all factual issues absent a cross-appeal by Respondent. However, this case is totally inapposite to the case at bar and Petitioner's argument ignores the patent dissimilarities between the two trials of this case.

The *Arnold* decision does not address whether an appellee's failure to appeal an adverse jury finding of fact precludes resubmission of that factual issue after a general remand for new trial. The only "authority" for Petitioner's argument is, in reality, merely language in a footnote bearing no resemblance to the case at bar. First, the defendant in *Arnold* admitted liability. The only issue appealed was the amount of compensatory damages which the jury awarded in a lump sum for all elements of damage. After trial, the trial court determined it had committed error by permitting the jury to consider pain and suffering as an element of damages. In an attempt to correct its error, the trial court remitted a portion of the compensatory damages. The Court of Appeals reversed for new trial solely on the basis that remittitur was an improper device for correcting a perceived error in the jury's charge. The most significant fact that distinguishes *Arnold* from the present case is that the Court of Appeals issued a limited mandate specifically ordering new trial on the amount of the compensatory award alone. No such specific or limited mandate was issued in this case and *Arnold* is therefore easily distinguishable.

The Tenth Circuit ordered a new trial on all "fact-bound" issues without limitation and held on appeal that liability and damages, both compensatory and punitive,

were fact issues for jury determination and the trial court therefore did not abuse its discretion in ruling that all issues of liability and damages were matters for the jury. Pet.App. 11a.

The "law of the case" doctrine simply does not apply where the evidence on retrial is "substantially different" than that presented at the original trial. *See Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982). As observed above, the evidence adduced at the second trial so substantially and significantly varied from the first as to prevent meaningful comparison. In such a posture, the trial court properly permitted the factual issue of whether Texaco's degree of misconduct warranted punitive damages to be considered by the jury.

The other opinions cited by Petitioner are equally unilluminating on the issue as they, as well, are inapposite on the facts or the procedural posture of the cases before each circuit. *Laffey v. Northwest Airlines*, 740 F.2d 1071 (D.C.Cir. 1984) was a complex Title VII and Equal Pay Act case in which the defendant airline sought to object to the trial court's formula for calculating back-pay on a second appeal, although it had not appealed the formula used on its first appeal. The Court of Appeals properly held that a defendant could not obtain appellate relief on a claim it had not raised on its first appeal. Once again, this case involves the scope of appellate review rather than the scope of a new trial after a general remand. *See also, Alioto v. Cowles Communications, Inc.*, 623 F.2d 616 (9th Cir. 1980).

The case of *Bethea v. Levi Strauss & Co.*, 916 F.2d 453 (8th Cir. 1990), is equally unavailing to Petitioner's cause.

In *Bethea* the Circuit Court reversed in part and affirmed in part a district court's judgment, then directed that the district court enter judgment in conformity with the mandate. No new trial was ordered. On remand, the district court reconsidered a prior ruling and awarded the plaintiff additional relief beyond the original judgment. The Eighth Circuit reversed, noting that a district court is bound to strictly obey the mandate and cannot reexamine issues settled by a higher court. Significantly however, this case also held, consistent with Tenth Circuit authority, that if substantially different evidence is introduced on retrial, the district court is not bound to follow its decisions in an earlier proceeding. 916 F.2d at 456. *See also Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094 (11th Cir. 1987).

The remaining cases which allegedly conflict with Tenth, Seventh, and Federal Circuit authority are similarly inapposite. *See Washington Post Co. v. HHS*, 865 F.2d 320 (D.C.Cir. 1989) (appellate court issued a limited mandate with directions to determine only one specific factual issue); *Habecker v. Clark Equipment Co.*, 942 F.2d 210 (3d Cir. 1991) (Third Circuit reversed because district court took too restrictive a view of the scope of new trial after remand, noting that a trial court is free to consider any issues not expressly or implicitly disposed of by the appellate decision). As can readily be seen, the purported conflict among the circuit courts evaporates upon reference to the opinions themselves and the evaluation of the context in which their holdings were made.

Both the Tenth Circuit Court of Appeals and the District Court in this case recognized that "punitive damages are inextricably interwoven with the issue of

liability," is not an "issue separate from the balance of plaintiff's case," and therefore when the entire issue of liability and damages are subject to retrial, punitive damages must be retried as well. See Pet.App. 14a, 66a-67a.[8]

Based on the foregoing recitation and examination of circuit authority, it is evident that the Tenth Circuit opinion in the present case is not inconsistent with authority prevailing in any other circuit. Further, the decision of the courts below are well-grounded in the facts, the law and reason. Texaco decries the potential fate of litigants who prevail at trial only to lose on appeal if the judgment in this case is allowed to stand. However, the Respondent prevailed at trial in this case *on the evidence.* The evidence at the second trial was substantially altered at the behest of Texaco and also at its peril. It should not now be heard to complain as to the result because the jury weighed the evidence and found Texaco's conduct badly wanting.

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[8] Petitioner argues that punitive damages are a "unitary" issue that can be tried separately. This argument is contrary to prevailing law. See *McDonald v. Johnson & Johnson,* 722 F.2d 1370, 1388 (8th Cir. 1983), *cert. denied,* 469 U.S. 870 (1984). Following this Court's decision in *Haslip,* this issue has arisen in at least one of the cases remanded for reconsideration in light of that opinion. The court in *Hutchinson v. Stuckey,* 952 F.2d 1418, 1422 (D.C. Cir. 1992), held "when a new trial is ordered on actual damages, the question of punitive damages should also be retried [citation omitted]."

CONCLUSION

For the reasons stated above, Diana L. Mason respectfully requests that this Court deny the Petition For Writ of Certiorari to the Tenth Circuit.

Respectfully submitted,

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No. 91-1430

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

TEXACO INC.,
Petitioner,

v.

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Was the jury's punitive damages award of $25,000,000 constitutionally defective because the award was subject only to limited post-trial review for "excessiveness" under a "shock the conscience" test, instead of the rigorous post-trial review of objective factors approved in *Haslip*?

2. Did Plaintiff's failure to cross-appeal the adverse jury verdict on her punitive damages claim in the first trial preclude her from relitigating her claim for punitive damages in the second trial?

RULE 29.1 STATEMENT

The statement required by Rule 29.1 was included in Petitioner's petition for certiorari.

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PETITIONER'S REPLY BRIEF

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1. The first ground asserted by Respondent Diana L. Mason ("Mason") is that "Petitioner [Texaco] failed to present its due process arguments in a timely manner, as required by consistently applied federal practice." Brief in opposition at 5. Although this is the first ground put forward in Mason's "Summary of Argument," it is nowhere again mentioned in her argument.

In her Statement of the Case, however, Mason states that, after the second jury verdict, "Texaco then brought a Motion for Judgment Notwithstanding the Verdict or New Trial wherein it raised for the first time during this litigation the issue of the constitutionality of the punitive damage award." Brief in opposition at 3 (note omitted). It would have been impossible, of course, for Texaco to challenge the punitive damage award on *any* ground be-

fore the second jury returned its verdict. The motion for JNOV or a new trial was the first opportunity for Texaco to challenge the punitive damages award after the verdict, and, as Mason concedes, Texaco directly challenged the constitutionality of that award under the Due Process Clause in the motion. Moreover, Texaco argued its constitutional challenge in the Tenth Circuit, and in its decision that court addressed the due process issues and analyzed this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). App. 26a; 948 F.2d at 1559.

Mason's reliance on *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988), Brief in opposition at 3 n.1, is misplaced. This Court in *Bankers Life* declined to reach a federal constitutional challenge to a punitive damages award that the petitioner had not specifically raised in the Mississippi courts. Here Texaco fully briefed and argued its due process challenge in both of the courts below, and thus the constitutional question here was preserved for this Court's review.

2. Mason's position on the conflict among the circuit courts is inconsistent. On the one hand, she states that the circuit courts have "offer[ed] a variety of interpretations and solutions to the issues addressed by this Court in *Haslip*," but on the other hand she states that "the circuit courts have displayed uncommon uniformity in applying *Haslip*." Brief in opposition at 8, 10. Her very short discussion of the conflict between the Fourth, Eighth, and Eleventh Circuits, and the Tenth and Fifth Circuits, Brief in opposition at 21, does not undercut the analysis in Texaco's petition for certiorari: there is an important conflict over whether limited post-trial review of punitive damages awards under the traditional "shock the conscience" standard satisfies the due process principles announced in *Haslip*.

Mason is in error in stating that the Eighth Circuit has cited with approval the Fifth Circuit's decision in

Eichenseer v. Reserve Life Insurance Co., 934 F.2d 1377 (5th Cir. 1991). Brief in opposition at 21. The Eighth Circuit decided *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), before the Fifth Circuit decided *Eichenseer* on remand from this Court, so obviously the Eighth Circuit did not cite that decision with approval or otherwise. (Mason asserts that the Eighth Circuit "has affirmed the jury award in *Robertson Oil*," Brief in opposition at 21, which is also incorrect. The Eighth Circuit remanded to the district court for reconsideration in light of *Haslip*, and the district court's decision, reported at 779 F.Supp. 994 (W.D. Ark. 1991), is now on appeal.)

3. Mason repeatedly suggests that Texaco advocates the adoption of federal common law to displace Kansas law on punitive damages. Brief in opposition at 6, 8, 11, 15. This suggestion is incorrect. Instead, Texaco's position is that this case shows, in a dramatic fashion, the need for this Court to examine the intersection of federal procedural law, the Seventh Amendment, and the Due Process Clause in the context of review of punitive damages verdicts in diversity cases.

4. In seeking to justify the striking inconsistency between the first and second jury verdicts, Mason asserts that "[t]here was no substantial similarity in the evidence presented at the first and second trial." Brief in opposition at 4, 8. This is incorrect. Plaintiff's witnesses at the second trial had all testified at the first trial. For its part, Texaco called three witnesses who had not testified at the first trial, but none of these new witnesses testified about Texaco's conduct. (One testified about the Coast Guard's failure to follow its own precautions, one testified about whose benzene was sold to the Coast Guard, and the last testified about toxicology.) The same detailed pretrial order governed both trials. The punitive damages instruction to the jury was the same in both trials. The evidence at the two trials that could be relevant to punitive damages was essentially identical.

5. Mason does not address her failure to cross-appeal from the denial of her motion for a new trial after the first jury rejected her claim for punitive damages. Instead, Mason focuses on the nature of the remand from *Mason I*, but she repeatedly misstates the judgment of the Tenth Circuit by stating that the remand was for "a new trial on all 'fact-bound' issues without limitation." Brief in opposition at 26, 4. To the contrary, the Tenth Circuit in *Mason I* did not mention punitive damages and the "fact-bound" issues it remanded for trial were limited to issues specifically raised by Texaco. Its mandate was as follows: "The judgment *against Texaco* is reversed and the case is REMANDED for a new trial." App. 148a; 862 F.2d at 250 (emphasis added).

Mason relies on *Hutchison v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992), for the proposition that punitive damages must be included in any new trial, because liability for compensatory damages cannot be tried by itself. Brief in opposition at 29 n.8. *Stuckey* stands for no such proposition. There the district court had ordered a new trial on the ground that the compensatory and punitive damages awarded by the jury were excessive, and the D.C. Circuit affirmed. (Thus *Stuckey* differs from this case in the critical respect that the first jury in this case declined to award any punitive damages.) The D.C. Circuit, citing *Haslip*, noted that the "jury should be permitted to consider the amount of actual damages in calculating a punitive damage award," 952 F.2d at 1422, and therefore the amount of punitive damages would have to be resubmitted to the jury in the new trial.

Respectfully submitted,

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